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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 374

TICONIC NATIONAL BANK, PEOPLES-TICONIC NATIONAL BANK, ET AL., PETITIONERS,

vs.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1937.

CERTIORARI GRANTED OCTOBER 18, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Captions omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION

No. 990 Equity.

LOTTIE F. SPRAGUE and MARGARET DAVIS SPRAGUE

vs.

TICONIC NATIONAL BANK, PEOPLES-TICONIC NATIONAL BANK and ARTHUR G. PICHER, as He is Receiver of Both Said Banks

[fol. 2] BILL OF COMPLAINT—Filed July 29, 1935

Lottie F. Sprague of Northport, Maine, and Margaret Davis Sprague of Monson, Maine, complain against the Ticonic National Bank of Waterville, Maine, the Peoples-Ticonic National Bank of Waterville, Maine, and Arthur G. Picher of Waterville, Maine, as he is receiver of both said banks and says:

First. The said Ticonic National Bank was duly organized under the national banking act in 1865 and has ever since continued to be and now is a national banking association.

The said Peoples-Ticonic National Bank was duly organized under the national banking act in 1865 and has ever since continued to be and now is a national banking association.

Second. December 30, 1926, the Federal Reserve Board granted to the Ticonic National Bank a special permit to act in fiduciary capacities in accordance with the provisions of Section 11 (k) of the Federal Reserve Act.

Third. Following said grant of authority on said 30th of December, 1926, the directors of said Ticonic National Bank enacted certain by-laws establishing a separate trust department in the bank and providing for its management and the safety of funds entrusted to its care. A copy of said by-laws marked Exhibit A is hereto annexed and made a part hereof.

Fourth. March 28, 1931, the plaintiff Lottie F. Sprague delivered and entrusted to said trust department of said Ticonic National Bank five thousand twenty-two dollars and eighteen cents to establish a trust for the benefit of plaintiff Margaret Davis Sprague under an agreement, copy of which marked Exhibit B is hereto annexed and made a part hereof.

[fol. 3] Fifth. From time to time subsequent to December 20, 1926, bonds were segregated by said Ticonic National Bank and held as security for performance of its trust obligations until it so held the bonds shown by the following list:

Title of issue	Rate	Par value
Berlin City Electric Co. 1959	6½	$ 9,000
Central Power & Light Co. 1956	5	15,000
Indiana Electric Corp. 1953	6½	5,000
International Paper Co. 1947	5	12,000
International Tel. & Tel. Co. 1952	4½	5,000
Kentucky Utilities Co. 1948	6½	10,000
Kingdom of Denmark 1942	6	20,000
Michigan Gas & Elec. 1943	6	10,000
Missouri Pac. R. R. 1980	5	20,000
Oklahoma Natural Gas Corp. 1948	5	10,000
Penn Ohio Edison Co. 1950	6	10,000
Peoria & Pekin Union Ry. 1974	5½	10,000
Portland Terminal Co. 1961	5	25,000
Texarkana & Fort Smith Ry. 1950	5½	10,000
U. S. Rubber Company 1947	5	10,000
Wabash R. R. 1957	5½	10,000
S. D. Warren Co. 1945	6	10,000

Sixth. January 13, 1931, the annual meeting of stockholders of said Ticonic National Bank was held and at said meeting Mr. Charles W. Vigue and Mr. Carroll N. Perkins, both of whom were directors of the Peoples National Bank and also respectively president and attorney thereof, were elected to the same positions in the Ticonic National Bank and ever after continued to serve in those positions in both banks and Mr. Vigue became the active executive head of both banks.

Seventh. August 3, 1931, by contract authorized by votes of the directors of each bank and executed by the proper

officers of each the Peoples National Bank bought all the assets and assumed all the liabilities of the Ticonic National Bank and plaintiffs say that the assets included the bonds listed in paragraph fifth above and that the liabilities in-
[fol. 4] cluded the trust obligation set out in paragraph fourth. And plaintiffs further allege that all the directors and officers of said Peoples National Bank had full and complete notice and knowledge of all the terms, conditions, provisions and obligations arising under and from said trust agreement of March 28, 1931, and under and from the by-laws of said Ticonic National Bank and under and from the segregation of securities as set forth in paragraph fifth.

Eighth. And plaintiffs say that on said third day of August, 1931, said Peoples National Bank appropriated the word Ticonic as a part of its own name and is now called and known by the name of Peoples-Ticonic National Bank and that it is the defendant so named in this bill of complaint.

Ninth. From and after said third day of August, 1931, said Ticonic National Bank ceased active business as a bank.

Tenth. March 4, 1933, the Peoples-Ticonic National Bank was closed by order of the President of the United States.

March 25, 1933, Charles W. Vigue was appointed conservator of said bank and received all its assets including the bonds listed in paragraph fifth.

November 6, 1933, Arthur G. Picher was appointed receiver of said bank and took over all of its assets from said Charles W. Vigue including the bonds listed in paragraph fifth.

June 28, 1934, the same Arthur G. Picher was appointed receiver of the Ticonic National Bank.

Wherefore plaintiffs pray:

1. That this their bill may be sustained.

2. That defendants may be held to answer.

3. That the trust declared in said agreement of March 28, 1931, may be declared valid and binding.

4. That the securities listed in paragraph fifth may be holden as security for performance of said trust agreement.

5. That plaintiffs may have such other and further relief as may be necessary.

[fol. 5] The plaintiffs further pray this Honorable Court to issue its writ of subpœna, in due form of law and according to the course and practice of the Court, directed to the said Ticonic National Bank, the said Peoples-Ticonic National Bank and the said Arthur G. Picher as he is receiver of both said banks, defendants as aforesaid, commanding them at a certain day and under a certain penalty to be therein specified to appear before this Honorable Court to answer all and singular the matters and things hereinbefore set forth and complained of and to stand by and abide and perform all the orders and decrees of the Court herein.

Lottie F. Sprague, Margaret Davis Sprague, by Harvey D. Eaton, Their Attorney. Harvey D. Eaton, Solicitor for Plaintiffs.

EXHIBIT "A" TO COMPLAINT

December 30, 1926.

A meeting of the Directors was held this day, the following being present: Mr. Boutelle, Mr. Brown, Mr. Daggett, Mr. Leighton, Mr. Taylor and Mr. Ware:

The following resolution was offered, seconded and duly adopted:

Whereas the Federal Reserve Board has by special permit granted to this national bank the right to act in fiduciary capacities under the provisions of Section 11 (k) of the Federal Reserve Act.

1. Separate Department

Now, Therefore, Be It Resolved that pursuant to the provisions of the Regulations of the Federal Reserve Board there is hereby established a separate trust department of the Ticonic National Bank which shall be under the management of George K. Boutelle, Trust Officer, and Cyril M. Joly, Assistant Trust Officer.

[fol. 6] 2. Duties of Trust Officer

Be It Further Resolved that (a) The duties of said Trust Officers, shall be to manage, supervise and direct the activi-

ties of the Trust Department of The Ticonic National Bank, acting in fiduciary capacities authorized under the permit granted by the Federal Reserve Board; to do and perform all acts and things whatsoever necessary or proper to be done or performed in carrying on the business of said Trust Department in accordance with the provisions of the State and Federal laws and Regulations of the Federal Reserve Board, and in general to perform all acts incident to the carrying on of said business, or prescribed by the Board of Directors of said bank. (b) Opinion of counsel, where necessary, shall be obtained and filed in all important matters pertaining to trusts, both individual and corporate.

3. Books and Records

Be It Further Resolved that adequate books and records shall be installed in the Trust Department for all fiduciary activities, both individual and corporate, and such books and records shall be kept separate and distinct from other books and records of the bank. All accounts opened shall be so kept as to enable the bank at any time to furnish information or reports required by the Federal or State authorities, and such books and records shall be open to the inspection of such authorities.

There shall be maintained in the trust department a file containing (a) Original instruments creating each trust or properly authenticated copies thereof, (b) Properly receipted vouchers evidencing payments under each trust, and (c) Properly evidenced reports to courts, or others, accounting for trusts.

4. Securities and Investments

Be It Further Resolved, that the trust securities and investments held in each trust shall be kept separate and distinct from the securities owned by the bank and separate and distinct one from another, and shall be placed in the joint custody of Miss Myrtle L. Jordan and Mr. Lorimer H. Dixon, who are employees of the bank or their successors
[fol. 7] hereafter designated by the Board of Directors, and that such custodians shall at all times be adequately bonded. The securities shall be so kept as to make it impossible for any one custodian to have access to the trust securities or investments without the presence of one of the other custodians named with him.

5. Deposit in Commercial Department of Trust Funds Awaiting Investment or Distribution

Be It Further Resolved that whenever funds received or held in the trust department awaiting investment or distribution, are deposited in the Commercial Department to the credit of the trust department, the commercial department shall first deliver to the trust department, as collateral security, United States Bonds or other marketable securities owned by the bank, which collateral security shall at all times be at least equal in market value to the amount of the funds so deposited.

6. Investment of Trust Funds

Private Trusts

Be It Further Resolved that (a) Funds held in trust must be invested in strict accordance with the terms of the will, deed or other instrument creating the trust. Where the instrument creating the trust contains provisions authorizing the bank, its officers, or its directors to exercise their discretion in the matter of investments, funds held in trust shall be invested only in those classes of securities which are approved by the directors of the bank.

Where the instrument creating the trust does not specify the character or class of investments to be made and does not expressly vest in the bank, its officers or its directors a discretion in the matter of investments, funds held in trust shall be invested in any securities in which corporate or individual fiduciaries in the State in which this bank is located may lawfully invest.

Court Trusts

(b) Except as hereinafter provided, where this national bank acts as executor, administrator, or in any other fiduciary capacity, under appointment by a court of com- [fol. 8] petent jurisdiction, all investments shall be made under an order of that court, and copies of all such orders shall be filed and preserved with the records of the trust department of this bank.

If the court by general order vests a discretion in this national bank to invest funds held in trust, or if under the laws of the State in which this bank is located corporate fiduciaries appointed by the court are permitted to exercise such discretion, this bank so appointed shall invest such

funds in any securities which corporate or individual fiduciaries in this State may lawfully invest.

(c) All investments of trust funds shall have the approval of this Board of Directors, or a committee appointed for that purpose, and such approval shall be recorded in the minutes.

(d) No trust funds shall be loaned to any director, officer or employee of this bank in violation of the prohibition contained in Section 11 (k) of the Federal Reserve Act.

7. Examining Committee

Be It Further Resolved that a committee from the Board of Directors of this bank shall in the months of January and July of each year make or supervise the making of a thorough and complete audit of all records of the trust department, and shall make a complete and careful examination of all securities held by the trust department. Such committee shall make a report in writing to the full Board of Directors covering such examination and the report of such examination shall become a part of the minutes of the Board of Directors of this bank.

EXHIBIT "B" TO COMPLAINT

This Indenture made this twenty-eighth day of March, 1931, between Lottie F. Sprague, now residing in the City of Waterville, Maine (hereinafter called the "Grantor"), party of the first part, and Ticonic National Bank of Waterville, Maine, a national banking corporation organized and existing under the laws of the United States (hereinafter called the "Trustee"), party of the second part:

[fol. 9] Witnesseth:

That the Grantor in consideration of the sum of One Dollar ($1.) to her in hand paid by the Trustee, the receipt whereof is hereby acknowledged, and of the covenants hereinafter contained, hath deposited, transferred and set over, and by these presents doth deposit, transfer and set over unto the Trustee the sum of $5022.18, the receipt of which is hereby acknowledged by the Trustee.

To Have and to Hold the said money to the said Trustee, its successors or assigns upon the following express trust

and conditions and with the powers and limitations hereinafter conferred and set forth, that is to say:

1. The Trustee is expressly authorized and empowered to invest and reinvest the sum, accumulations, and any parts thereof, in such bonds or securities as it in its discretion may determine, and whether or not the same be authorized by law for the investment of trust funds, reserving uninvested at least one thousand dollars which the Trustee is expressly authorized and empowered to deposit in its savings department at its usual and existing rates of interest,

2. The Trustee shall collect and receive the income, interest and dividends therefrom, and on the first banking day of each month beginning with April 1, 1931, the Trustee shall pay the sum of fifty dollars from said fund and accumulations, to Margaret Davis Sprague, said payments to continue until said sum and accumulations are exhausted or until the death or remarriage of said Margaret Davis Sprague, which- event occurs first.

3. Upon the death or remarriage of said Margaret Davis Sprague, then the Trustee shall pay on the first banking day of each month, from said fund and accumulations the sum of fifty dollars, to any child of Margaret Davis Sprague and the late Alden Cecil Sprague that may be then living, said payments to continue until said sum and accumulation are exhausted or until the death of said child whichever event occurs first.

[fol. 10] 4. The Trustee hereunder shall be entitled to receive reimbursements for all expenses incurred by it in connection with said trust and as its compensation five per cent. of the income annually and a distributive fee upon the termination of the Trust of two per cent. of the balance then in said trust fund.

5. Upon the death of or remarriage of Margaret Davis Sprague and the death of any child of Alden Cecil Sprague born to Margaret Davis Sprague this trust shall terminate and end.

6. The Grantor hereby expressly reserves and retains the right at any time by a notice in writing, signed and acknowledged by her and filed with the Trustee, to revoke, cancel and annul this indenture and the trust hereby created in

whole or in part and to resume possession of the trust funds free and discharged from this indenture and the trust created hereby and also reserves and retains the right at any time and from time to time by a notice in writing, signed by her and filed with the Trustee, to alter, amend and modify this agreement in any and every respect, and in the event of the revocation by said Grantor under the provisions of this paragraph the trustee shall be entitled to a revocation fee of $25.00 instead of the distributive fee of two per cent. as provided by paragraph Four of this agreement.

7. The Grantor hereby expressly reserves and retains the right at any time by direction in writing to the Trustee, signed and acknowledged by her, to increase the amount of any one or more of the monthly payments herein provided.

8. Upon the termination of this trust in any manner before the sum and accumulations are paid out by the Trustee under the provisions hereof, then any balance shall be turned back to the Grantor, her heirs and assigns.

9. The exercise of all rights retained, reserved, and existing in, the Grantor, shall upon the death of the Grantor be exercised by her son, Richard L. Sprague.

10. It is expressly understood that the Trustee shall have the right at any time to resign by giving a written notice of [fol. 11] its resignation to the Grantor, if living, and if she be not living, then to Richard L. Sprague, and if he be not living to the then beneficiary of the trust.

11. The Trustee by joining in the execution of this agreement hereby signifies its acceptance of the trust.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year first above written.

Lottie F. Sprague (Seal), Ticonic National Bank (Ticonic Bank Seal), by George K. Boutelle, Trust Officer.

Duly sworn to by Lottie F. Sprague and George K. Boutelle. Jurats omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

SUBPŒNA WITH ACKNOWLEDGMENT OF SERVICE THEREON

The President of the United States of America to Ticonic National Bank of Waterville, Maine, the Peoples-Ticonic National Bank of Waterville, Maine, and Arthur G. Picher of Waterville, Maine, as he is receiver of both said banks, Greeting:

You are Hereby Commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the District of Maine, at Portland, to answer unto the bill of complaint of Lottie F. Sprague of Northport, Maine, and Margaret Davis Sprague of Monson, Maine, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable John A. Peters, United States District Judge at Portland, this 30th day of July, A. D. 1935.

John F. Knowlton, Clerk. (Seal.)

Memorandum

The Defendants in this case are required to file their answers or other defenses in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

[fol. 13] c7—1538

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Maine, ss:

I hereby certify and return, that on the 2nd day of August, 1935, I received the within Subpœna in Equity, and hereby acknowledge due, legal and sufficient service thereof.

F. Harold Dubord, Attorney for all said Defendants.

IN UNITED STATES DISTRICT COURT

JOINT ANSWER OF DEFENDANTS—Filed August 22, 1935

To the Honorable Judge of the District Court of the United States, for the District of Maine:

The joint Answer of the Ticonic National Bank of Waterville, Maine, the Peoples-Ticonic National Bank of Waterville, Maine and Arthur G. Picher of Waterville, Maine, in his capacity as Receiver of both of said banks, defendants in the above entitled cause, to the Plaintiff's Bill of Complaint.

1. The defendants admit the allegations in Paragraph One of Plaintiffs' Bill.

2. The defendants admit the allegations in Paragraph Two of Plaintiffs' Bill.

3. The defendants admit the allegations in Paragraph Three of Plaintiffs' Bill.

4. The defendants admit the allegations in Paragraph Four of Plaintiffs' Bill.

5. The defendants deny the allegations in Paragraph Five of Plaintiffs' Bill.

[fol. 14] 6. The defendants admit the allegations in Paragraph Six of Plaintiffs' Bill.

7. The defendants admit that by contract dated August 3rd, 1931, said contract being authorized by vote of the directors of each bank, and executed by the proper officers of each bank, that the Peoples National Bank bought all of the assets and assumed some of the liabilities of the Ticonic National Bank, but the defendants deny that the assets included the bonds listed in Paragraph Five of Plaintiffs' Bill, with the exception of Kingdom of Denmark bonds of the par value of $20,000, and that the liabilities included the alleged trust obligation set out in Paragraph Four of Plaintiffs' Bill. The defendants deny all of the other allegations in Paragraph Seven of Plaintiffs' Bill.

8. The defendants admit the allegations in Paragraph Eight of Plaintiffs' Bill.

9. The defendants admit that from and after August 3rd, 1931, the Ticonic National Bank ceased active business as a

bank, but by way of further Answer, the defendants aver that the directors of the Ticonic National Bank continued to hold meetings as such directors after August 3rd, 1931, and that the officers of the Ticonic National Bank continued to administer the alleged trust created by and between the Ticonic National Bank, and the plaintiff, Lottie F. Sprague.

10. The defendants admit the allegations in Paragraph Ten of Plaintiffs' Bill.

11. By way of further Answer, the defendants aver that on March 28, 1931, the plaintiff, Lottie F. Sprague, conveyed to the Ticonic National Bank the sum of $5,022.18 in accordance with a certain agreement referred to in Paragraph Four of Plaintiffs' Bill, copy of which agreement marked "Exhibit B" is attached to Plaintiffs' Bill. The defendants further aver that when the Ticonic National Bank and the Peoples National Bank consolidated by contract dated August 3rd, 1931, no reference was made in the contract of consolidation, or in any other manner relative to the trust al- [fol. 15] leged to have been created by the plaintiffs or relative to any other private trust in which the Ticonic National Bank was the trustee, and that there was no agreement of any kind made whereby the Peoples National Bank, subsequently known as the Peoples-Ticonic National Bank, was substituted as trustee for the Ticonic National Bank. The defendants further aver that on and after August 3rd, 1931, the officials of the Ticonic National Bank continued to exercise supervision of the trust alleged by the plaintiff, and of all other trust accounts held by the Ticonic National Bank. That subsequent to the consolidation, the officers of the Ticonic National Bank deposited in the Peoples-Ticonic National Bank the aggregate of all funds held by the Ticonic National Bank by virtue of private trust agreements, including the balance in the trust created by the plaintiff, Lottie F. Sprague, in an ordinary commercial checking account in the Peoples-Ticonic National Bank; that said deposit in the Peoples-Ticonic National Bank in its regular commercial checking account, including the balance in the Lottie F. Sprague account, was in no way secured, and that any attempt to secure said deposit by the officers of the Peoples-Ticonic National Bank would have been invalid and void. That since the execution of the agreement of March 28th, 1931, there has been paid various sums to the beneficiaries named by the plaintiff, Lottie F. Sprague, so that there now

remains on deposit in the Peoples-Ticonic National Bank as a balance in the said Lottie F. Sprague account, as of August 19th, 1935, the sum of $3,649.65; that Paragraph One of the agreement of March 28th 1931, expressly authorizes the trustee to reserve uninvested the sum of at least $1000 and to deposit said sum in its savings department at its usual and existing rates of interest, and as a result thereof, in no event was there any other relationship created between Lottie F. Sprague and the Ticonic National Bank, in so far as the amount of $1000. is concerned, except that of debtor and creditor. And the defendants further aver that said deposit is in law and in equity only a general deposit, and that the plaintiffs are not entitled to priority, but are entitled only to share as general creditors of the Peoples-Ticonic National Bank in such balance as was on deposit on March 4th, 1933.

[fol. 16] Wherefore, the defendants pray that the Plaintiffs' Bill may be dismissed with costs to the defendants in this behalf wrongfully sustained.

Ticonic National Bank of Waterville, Maine, Peoples-Ticonic National Bank of Waterville, Maine, Arthur G. Picher, Receiver of Both Banks, by F. Harold Dubord, Their Attorney. F. Harold Dubord, Solicitor for Defendants.

In United States District Court, District of Maine
(Southern Division)

No. 990 Equity

Lottie F. Sprague et al.

vs.

Ticonic National Bank et als.

Before Peters, J.

In Chambers

Statement of Evidence

Portland, Maine, 21st February, 1936.

The following matter came on for hearing before Hon. John A. Peters, U. S. District Judge, in chambers, at the

U. S. Courthouse, Portland, Maine, by agreement, beginning at 2:15 p. m., E. S. T.

Appearances.

For the Plaintiff: Harvey D. Eaton, Esq., Attorney at Law, Waterville, Maine.

For the Defendants: F. Harold Dubord, Esq., Attorney at Law, Waterville, Maine.

[fol. 17] COLLOQUY

Mr. Eaton: Now, if the Court please, Lottie F. Sprague is one of our good women up there, and a few years ago she had a son die whose life was insured for five thousand dollars, and he left a little boy—only a year or two old. Mrs. Sprague received——

The Court: Now all I need are the facts to make a record so I can make up my mind what the result is.

Mr. Sprague: Well, there is only one question between us. Everything in the first four paragraphs, I think, is admitted. Now under its by-laws the Ticonic Bank, at various times, segregated bonds as security for trusts——

The Court: Well, are you talking about this trust; or what?

Mr. Eaton: In general, for all trusts.

The Court: They are required to do that by law?

Mr. Eaton: Yes. And also their by-laws provided very carefully for the care and management of those securities; and particularly they set aside $20,000. Kingdom of Denmark bonds, which my brother and I are agreed are holden, if anything is holden, for security for this and all other trusts——

The Court: They set aside securities in amount sufficient to cover all the trusts that they had set up according to their books? Is that correct?

Mr. Eaton: That is correct. We will disagree upon the interpretation of the thing as we go along, but it is a fact that there were $20,000. of Kingdom of Denmark bonds segregated to protect uninvested funds in trust accounts in the Peoples-Ticonic National Bank.

The Court: If the funds were invested, that would be the protection——

Mr. Eaton: If they are properly invested of course.

Mr. Dubord: The by-laws themselves cover that. That it is uninvested funds.

(Court and counsel examine and read by-laws.)

* * * * * * *

The Court: Yes. But that doesn't cover invested funds.

Mr. Eaton: Funds held pending investment.

The Court: That is what I said. Of course if the funds had been invested they would no longer require protection. [fol. 18] Mr. Eaton: The point here is that they never invested a dollar. They held the whole of it in their commercial department.

The Court: This money wasn't invested, but was held—what does that by-law say, again?

Mr. Eaton: "Be it further resolved that whenever funds received or held in the trust department awaiting investment or distribution, are deposited in the commercial department to the credit of the trust department, the commercial department shall first deliver to the trust department, as collateral security, United States bonds or other marketable securities owned by the bank, which collateral security shall at all times be at least equal to the market value of the amount of the funds so deposited."

The Court: Were these funds deposited in the commercial department to the credit of the trust department?

Mr. Eaton: I don't know.

Mr. Dubord: I can tell you what happened, and we intend to.

Mr. Eaton: This money was received in March, 1931, and they simply entered it in the commercial department and never bought any security of any kind; and as I say——

The Court: Well, is this argument, or evidence, or what is it? You state facts here. Do you agree that that is so? It doesn't do me any good when those facts are stated, unless Mr. Dubord either agrees to it or the facts are proved.

Mr. Dubord: A lot of that is going into the record which shouldn't go in the record at all. I don't admit it in that form.

The Court: It has got to be either proved to me, or you have got to have a stipulation—admit it. In other words, in order to make a record you have got either to have evidence or a stipulation. There is no other way.

(Court and counsel confer, which, by direction of the Court, is not made a part of this record.)

* * * * * * *

Mr. Eaton: I think it appears from my brother's answer—at any rate it is admitted—that the bank received this money and as a matter of fact it didn't——

The Court: All right. Are you arguing, or what are you doing?

[fol. 19] Mr. Eaton: I was trying to give the Court an idea of what the case is.

The Court: I can see what the case is. Now I want evidence.

Mr. Dubord: I am willing to admit——

Mr. Eaton: I think the precise question isn't yet stated. Just a minute, please, and I will try to state it. Paragraph No. 1 of the indenture provides:

"The Trustee is expressly authorized and empowered to invest and reinvest the sum, accumulations and any parts thereof, in such bonds or securities as it in its discretion may determine, and whether or not the same be authorized by law for the investment of trust funds, reserving uninvested at least one thousand dollars which the Trustee is expressly authorized and empowered to deposit in its savings department at its usual and existing rates of interest."

Now, the question arises—the bank accepted this money and they bought no securities and made no investments or deposits in the savings department——

The Court: Do you agree to that? It is no use to tell me facts unless you prove them or the other side agrees to them.

Mr. Dubord: I agree that no bonds were bought.

The Court: Wouldn't it be better to produce what records you have here on the bank's side; and probably Mr. Eaton won't disagree with what your records show, and your records will probably show the whole story.

Mr. Dubord: Well, if he is done, I'll tell you what I am willing to stipulate.

Mr. Eaton: I would like to tell you our side of it.

The Court: Very well.

Mr. Eaton: Now, then, the trust in a general way is acknowledged, but my brother claims that as to that thousand dollars which they were allowed to deposit in their

savings department, that the present plaintiff is simply a general creditor——

The Court: As to that only?

Mr. Eaton: And that only.

Mr. Dubord: It seems to me that everything that has been [fol. 20] put into the record so far should be stricken out entirely. None of it is evidence. And we should start anew.

The Court: I think that may be true. Now you have some records showing when this fund was deposited, etc. Tell me what the records of the bank show about it. They will probably tell the whole story.

Stipulations as to Certain Facts

Stipulation

It is stipulated and agreed that the trust agreement attached to the bill as one of the exhibits was executed by and between the Ticonic National Bank and Lottie F. Sprague, and that, pursuant to the agreement the sum of $5,022.18 was turned over to the Ticonic National Bank or its trust officers.

And it is further stipulated and agreed that from the date when the money was paid over to the Ticonic National Bank, —to wit, March 28, 1931—down to the present time, various sums have been paid by the bank—the Ticonic National Bank—or its trust officers, to the beneficiaries of the trust, so that the amount on deposit in the so-called Sprague Trust at the present time is $3,649.65. Is that correct?

Mr. Eaton: So far as I know.

Mr. Dubord: It is further stipulated that the Ticonic National Bank segregated, for the purpose of securing the uninvested funds in all of its trusts, $20,000 of Kingdom of Denmark bonds.

It is further stipulated that that amount, and the price for which the bonds were subsequently sold, was in excess of the aggregate of all trust funds in the Ticonic National Bank.

It is stipulated that these Kingdom of Denmark bonds were subsequently sold by the Peoples-Ticonic National Bank for the amount of $20,722.66.

It is further stipulated that none of the funds in the alleged Sprague Trust were ever invested by the Ticonic National Bank in any security or otherwise; and that until the time of the consolidation of the Ticonic National Bank with the Peoples-Ticonic National Bank the funds deposited by virtue of this Sprague agreement were kept in a checking account in the commercial department of the Ticonic National Bank to the credit of the trust department of the Ticonic National Bank.

[fol. 21] The Court: Was that so from the beginning of the deposit?

STIPULATION

It is stipulated that such was the case from the time of the original deposit or turning over of the Sprague money to the Ticonic National Bank.

The Court: And up to the time of the receivership——

Mr. Dubord: I am going to come to that.

STIPULATION

It is stipulated that on August 3, 1931, an agreement was entered into by and between the Ticonic National Bank and the Peoples National Bank, whereby the two banks consolidated.

The Court (to Mr. Eaton): Do you agree? You are agreeing to all this, so far?

Mr. Eaton: I am agreeing to everything except the word "consolidate." Practically that was what was done, but actually the Peoples bought all the assets of the bank and put the bank out of business.

Mr. Dubord: We claim that they didn't buy all the assets; and that the contract of consolidation, or whatever you call it, said nothing at all with reference to trusts of any kind, including this so-called Sprague trust, and before we get through here I will introduce a copy of that agreement which will speak for itself. One of the issues will be interpretation of that contract.

STIPULATION

It is further stipulated that immediately after this agreement of August 3, 1931, the aggregate amount of the cash then on deposit in the trust department of the Ticonic National Bank, representing all the cash in the trust known

as the Ticonic National Bank Trust, amounted to $10,127.66.

It is further stipulated that this amount of $10,127.66 was deposited by the officials of the Ticonic National Bank in a commercial checking-account in the Peoples-Ticonic National Bank, the Peoples-Ticonic having received that name on that day.

[fol. 22] Mr. Dubord: I wouldn't want to say it did exactly on that same day, but the contract gave them the right to assume that name "Ticonic." The thing for us to remember is this: There were two banks in Waterville, one known as the Peoples National Bank and one known as the Ticonic National Bank. This Sprague trust now in issue was a Ticonic National Bank trust. Then the Peoples National Bank took over the Ticonic National Bank—Mr. Eaton says they took everything over; we say not everything. And at the same time, as a part of the contract, they took the right to use the word "Ticonic" and change the name to Peoples-Ticonic National Bank——

The Court: They were still going along as the Ticonic?

Mr. Eaton: The Ticonic wasn't going.

Mr. Dubord: The Ticonic ceased to do a banking business.

The Court: How could the Ticonic make a deposit with the Peoples-Ticonic if the Ticonic had ceased to be a bank?

Mr. Dubord: They were still there. They weren't out of business completely. They continued to hold Directors' meetings and continued to draw checks.

Mr. Picher: They went into voluntary liquidation.

Mr. Dubord: Subsequent to the deposit of the checking account in the Peoples-Ticonic National Bank of this sum of $10,127.66, on August 3, 1931, various amounts were deposited in this checking account by the officers of the Ticonic National Bank and checks drawn upon this account, so that at the date of the suspension of the Peoples-Ticonic National Bank, on March 4th, 1933, the aggregate amount in this checking account, representing the total of all former Ticonic National Bank trusts, was $12,462.21.

STIPULATION

It is further stipulated that among the assets bought by the Peoples National Bank at the time the Ticonic National Bank was taken over, were $20,000. Kingdom of Denmark bonds which had been segregated by the Ticonic National Bank to secure its uninvested trust funds; and it is further

stipulated that these bonds were subsequently sold in behalf——

[fol. 23] The Court: It seems that the Ticonic National Bank accepted this trust as such, placed the money in its commercial department as a credit to its trust department, and secured the deposit, with other like deposits, with bonds exceeding the value of the total amount of such trust deposits.

(Conference between Court and counsel.)

* * * * * * *

OFFERS IN EVIDENCE

(Defendant's Exhibit No. 1 marked.)

Mr. Dubord: We offer Defendant's Exhibit No. 1.

The Court: Admitted.

The Court: That is the only contract they had?

Mr. Dubord: That is the only one we know of.

The Court: And in pursuance of that they turned over cash and securities and so on?

Mr. Dubord: Yes.

The Court: Did they make any entry on their books in regard to this trust?

Mr. Dubord: Not a word about the trust anywhere.

The Court: How about the other trusts?

Mr. Dubord: Not a word anywhere.

(Plaintiff's Exhibit A marked.)

Mr. Eaton: We offer Plaintiff's A.

The Court: Admitted. What has that got to do with it? Harold admits that the first bank had it as a trust?

Mr. Eaton: Now just let me explain. At a meeting of the stockholders of the Ticonic National Bank held January 13, 1931, Charles W. Vigue and Carroll N. Perkins were elected directors. At the meeting of directors subsequently held on the same day Charles W. Vigue was elected president of the Ticonic Bank. At the same time he was president of the Peoples Bank; and, therefore, when sitting in that meeting of directors of the Ticonic Bank he was president of the Ticonic Bank and also president of the Peoples Bank.

The Court: Well, what of it?

Mr. Eaton: Notice to the Peoples Bank of that trust.

The Court: Notice that the Ticonic had the trust?

[fol. 24] Mr. Eaton: Yes. Notice that the Ticonic had received that trust.

The Court: I thought that is admitted.

Mr. Eaton: And the Peoples had notice of it.

Mr. Dubord: What difference would that make?

The Court: Yes. It might have been published in the newspapers, so far as that is concerned. But if they want to assume it, that is another matter. What I want to know is in what way the Peoples-Ticonic Bank assumed and agreed to execute the trust which we admit that the Ticonic Bank once had.

Mr. Eaton: August 3, 1931, the directors of the Ticonic Bank met, including Mr. Vigue, who was president of that bank; and upon the same day the directors of the Peoples Bank met, of which Mr. Vigue was also president, and they entered into an agreement to take over the assets of the Ticonic, and, as the contract says, perhaps I will read from this:

"Whereas, under the foregoing circumstances, the Directors of said Ticonic Bank deem it wise to enter into this agreement whereby all the depositors will be promptly paid or their accounts assured, and its known liabilities assumed by said Peoples Bank;"

Mr. Dubord: Yes, but they don't say that in the body of the agreement.

The Court: Well, the Peoples Ticonic did assume to pay all the depositors?

Mr. Dubord: Yes. But this wasn't the depositors. It was a trustee.

The Court: I thought it was a deposit.

Mr. Dubord: No. The deposit in the commercial department of the Ticonic Bank, of the bank itself as trustee. It wasn't in the same category as a deposit that you or I might have had in the bank.

The Court: I appreciate that fact, but it was a deposit.

Mr. Dubord: Yes, but a different type of a deposit, and in the body of the agreement that we have here there isn't a word said about any trust. And there is no difference in a [fol. 25] deposit made in the Peoples-Ticonic National Bank of that money than as if they had come down to Portland and put it into the Fidelity——

The Court: Well, put in your evidence. You are arguing. What I want is facts. What other facts have you to put in the record?

(Court and counsel confer, off the record.)

* * * * * * *

The Court: Now let Harold go ahead and put in the rest of the evidence. Then, if there is anything lacking, you can call attention to it.

ARTHUR G. PICHER, being duly sworn, testified as follows:

Direct examination.

By Mr. Dubord:

Q. Now, Mr. Picher, who was the Trust Officer of the Ticonic National Bank?

A. At what time?

Q. Well, prior to August 3, 1931?

A. George K. Boutelle; Cyril Joly.

Q. Both of those men were and are attorneys in Waterville?

A. That is right.

Q. Now after August 3, 1931, can you tell us what took place in so far as the administration of the so-called Ticonic Trust was concerned?

A. So far as can be seen from the record, the administration was continued by the trust officers of the Ticonic National Bank.

Q. And do you mean Mr. Joly and Mr. Boutelle?

A. And by Mr. Vigue, who was also trust officer.

Q. But also by the other two I have named?

A. Yes.

Q. Are there records of meetings of the Ticonic National Bank after August 3, 1931?

A. Yes, there are.

Q. Well, up to what date?

A. Up to—the last date of record is June 22, 1933.

Q. I have in my hand copy of record book of the Ticonic National Bank—of the Directors—and I turn to page 176 and will you tell us if there appears on that page a record

[fol. 26] of a meeting held on June 15th, 1932, of the Directors of the Ticonic National Bank?

A. Yes.

Q. Now to keep the record straight, I ask you if you find the record on page 176 of a meeting held on June 15th, 1932?

A. Yes.

Q. Who were present at that meeting?

A. George K. Boutelle, William J. Lanigan, William L. Brown, John Ware, Charles W. Vigue.

Q. Now will you tell us what was taken up at that meeting, according to those records? Giving it in substance?

A. Well, at this meeting the following resolution was adopted: "That, whereas the Ticonic National Bank is Trustee under an indenture of trust made to it by the Lombard Traction Engine Company, now known as the Lombard Tractor & Truck Corporation, which indenture is dated May 5, 1925, and recorded in Kennebec Registry of Deeds, Book 629, Page 111; and whereas it is the desire of said Ticonic National Bank to resign from said trust, Voted: That said Ticonic National Bank does hereby resign as Trustee under the above-named indenture, said resignation to take effect upon its acceptance by the Board of Directors of the Lombard Tractor & Truck Corporation and the appointment with the assent of the holders of the majority of the bonds secured hereunder, and the acceptance of the successor Trustee all in accordance with the terms of said indenture of trust. Upon Motion duly Seconded, it was voted to Adjourn."

Q. Now do those records show that a meeting of the Directors was held on October 22, 1936? I mean 1931?

A. Yes. It does.

Q. Was there a quorum present at that meeting?

A. A quorum being lacking, adjournment was taken until October 23rd, 1931.

Q. What do the records show about a meeting being held on October 23rd, 1931?

A. An adjourned meeting of the Directors was held at two o'clock, with the following directors present: Charles W. Vigue, G. K. Boutelle, W. J. Lanigan, Carroll Perkins, John Ware, W. L. Brown and J. L. Taylor.

Q. Do the records indicate that a meeting was held on November 25, 1931?

A. Yes, sir.

[fol. 27] (Book of records marked Defendant's No. 2.)
(Bundle of checks marked Defendant's No. 3.)

The Court: When the Peoples-Ticonic Bank succeeded the Ticonic, to the extent that it did succeed it, no securities representing invested trust funds formerly in the possession of the Ticonic were turned over to the Peoples-Ticonic; no securities representing any investment in securities by the Ticonic Bank as Trustee were turned over to the Peoples-Ticonic Bank; no cash and no individual trust was separately turned over to the Peoples-Ticonic, but included in the aggregate of all cash and assets turned over by the Ticonic to the Peoples-Ticonic was the amount represented on the books of the Ticonic as being the total of all uninvested funds held by the Ticonic and placed by it in its commercial department to the credit of its trust department.

(Mr. Picher resumes the stand.)

* * * * * * *

Direct examination continued.

By Mr. Dubord:

Mr. Eaton: I will say that the bond register of the Ticonic Bank was taken over by the Peoples-Ticonic and contained an entry of $20,000. Kingdom of Denmark in Trust Box 1080. I supposed the book would be here.

Mr. Dubord: That is true.

Q. Now, Mr. Picher, I show you 28 checks which are marked—which are grouped together and marked Defendant's Exhibit 3; and I ask you if you will tell us what those are?

A. These checks are the checks that were drawn in payment of trust funds, drawn by the Trust Officer of the Ticonic National Bank against the checking account in the Peoples-Ticonic National Bank.

Q. And are all of these checks payable to Margaret Davis Sprague, the beneficiary of the so-called Sprague trust?

A. Yes, sir.

Q. Are these checks all dated subsequently to August 7th, 1931?

A. Yes, they are.

Q. Now I see some checks here signed by Cyril M. Joly. Who was he?

A. Trust Officer of the Ticonic National Bank.

[fol. 28] Q. Was he trust officer or assistant trust officer?

A. Assistant trust officer.

Q. I see some are signed by George K. Boutelle? Who was George K. Boutelle?

A. He was trust officer of the Ticonic National Bank.

Q. I see some here, towards the last, with the sticker of the First National Bank, Waterville, Maine, over the name of the Ticonic National Bank. What does that mean?

A. That means that the proceeds of the moneys in the trust department of the Ticonic National Bank were placed in the First National Bank of Waterville after the formation of the new bank, for the payment of trust funds in the Ticonic National Bank.

Q. And how are those signed?

A. C. W. Vigue, President.

Q. Well, would you say they are signed "Ticonic National Bank, by C. W. Vigue, President"?

A. Yes.

Mr. Dubord: I offer Defendant's 3; and also 2.

The Court: Admitted.

Q. Now, Mr. Picher, these checks that we have just introduced here are all checks drawn in connection with the Sprague trust. Were there other checks drawn on this same account in connection with the other Ticonic trusts?

A. All Ticonic trusts were paid from the same account by check.

Q. How many Ticonic trusts were there in that same category as this Sprague matter?

A. Twelve, I believe. I am not positive.

Q. And were they all handled in similar manner?

A. Yes. All handled in similar manner.

Q. Will you tell us about a Charles W. Moore trust in the Ticonic National Bank? As to when that was started?

A. On the ledger card it shows February 2nd, 1932, one thousand dollars.

Q. That means that the officers of the Ticonic National Bank put in one thousand dollars on the Charles Moore trust?

A. I am assuming it is the Charles Moore trust from this date here.

Q. Was there other money taken in on that same trust, subsequently?

A. On July 22nd, 1932, there was received from the Ticonic National Bank interest at four per cent on uninvested principal, $8.34. They paid interest on that checking account. August 10th, 1932, was another interest payment of ten dollars.

[fol. 29] The Court: Who did they pay that to?

A. Paid it to the trust. They gave credit to the trust for the amount of interest——

The Court: I am talking about the Peoples-Ticonic Bank.

A. I am talking about the Ticonic. They credited interest to the account of the Charles Moore trust—and likewise to all trusts.

Q. And did they receive any other large amount from anybody connected with Moore?

A. November 2, 1932, one thousand dollars.

Q. Is there any other amount received from the administrator of the estate?

A. June 30, 1933, $891.25.

Q. Who was that received by?

A. Received by Ticonic National Bank.

Q. What was done with those funds?

A. They were placed in the Ticonic National Bank trust account in the Peoples-Ticonic National Bank.

Cross-examination.

By Mr. Eaton:

X Q. Mr. Picher, you say there was some ten thousand dollars of uninvested trust funds in the Ticonic Bank on the 3rd of August, 1931. That money was taken over by the Peoples-Ticonic, was it?

A. Yes, sir.

X Q. What was the entry made? Have you got that here?

A. Let's see. (Looks at paper.) Right here (indicating).

X Q. This is a sheet from what bank?

A. From the Peoples Bank. The Peoples-Ticonic.

X Q. Now show us that entry, please?

A. Well, right here—August 6th. On August 3rd the account was $10,127.66, and the next entry was August 6th.

X Q. There is no name there?

A. No.

X Q. Is that Trust Department?

A. Yes.

XQ. And you say that this amount here is the amount of uninvested trust funds received from the Ticonic?

A. That is right.

XQ. On what date?

A. The last date is July 27th, 1931. And the same amount held true on the date of the take-over.

XQ. That (indicating) had been used by the Ticonic Bank?

A. Yes.

[fol. 30] XQ. And on August 3rd it was taken into the possession of the Peoples-Ticonic?

A. Yes.

XQ. And carried on as the Peoples-Ticonic account?

A. Yes. No!

XQ. Well, carried on as the account of the Ticonic Trust in the Peoples Bank?

A. Yes.

(Plaintiff's No. B marked.)

Mr. Eaton: I offer Plaintiff's B.

The Court: Admitted. You had better put them all in.

A. These credits are a continuation of that account there.

XQ. So that on August 3rd, 1931, that uninvested trust money in the Ticonic was taken into the Trust Department of the Peoples?

A. No.

XQ. Well, was it entered as a trust account?

A. No. Entered in the checking account.

XQ. Entered in a checking account as a trust?

A. No. A checking account in the Peoples Bank.

XQ. That is headed "Trust Department."

A. Yes.

XQ. And the continuation of that is headed "Trust Department"?

A. Yes. But the beginning of that is Ticonic.

XQ. Very good. And it is continued, from and after August 3rd, as the Peoples? That account is continued by the Peoples Bank?

A. No. It is continued as the Ticonic Trust Account. The trust accounts were handled as individual accounts. Not like that at all.

X Q. This record from and after August third was kept by the Peoples?

A. Yes.

X Q. And it is headed "Trust Department"?

A. Yes.

X Q. That is Plaintiff's No. B.

The Court: That came from the other bank?

A. Yes.

X Q. And then the Peoples bank continued it under the same name of Trust Department until November 24th, 1933?

A. Yes.

X Q. How did it come to stop then?

A. The Receiver transferred the funds to the Receiver's account.

X Q. And you were the receiver?

A. Yes, sir.

X Q. Payments were made from that fund occasionally?

A. Yes.

[fol. 31] X Q. By checks drawn?

A. Yes.

X Q. I show you check dated August 7, 1931, signed Cyril M. Joly, Assistant Trust Officer, Account of Lottie F. Sprague Trust, Number 28. Who paid that?

A. The Peoples National Bank paid it.

X Q. The Peoples National Bank?

A. Yes.

X Q. That is Lottie F. Sprague Trust No. 28?

A. Yes.

X Q. Now, who paid the rest of these checks down to February 28, 1933?

A. The Peoples National Bank.

Mr. Dubord: Shouldn't you say the Peoples-Ticonic National Bank?

A. Yes.

X Q. Do all these checks appear to be drawn against the Lottie F. Sprague Trust?

A. No. They are drawn against the Trust Department of the Ticonic National Bank.

X Q. "Account of Lottie F. Sprague Trust"?

A. Yes.

XQ. And Mr. Boutelle was the Trust Officer of the Ticonic National Bank?

A. Yes.

XQ. And Mr. Joly was——

A. He was a Trust Officer in that case (indicating).

XQ. And who was Mr. Vigue?

A. He was president and trust officer of the Ticonic National Bank.

XQ. And what position did he hold in the Peoples National Bank?

A. President of the Peoples National Bank.

XQ. Which at that time was the Peoples-Ticonic?

A. Yes.

XQ. When did he become president of the Peoples National Bank?

A. Many years ago. I couldn't say.

XQ. When did he become president of the Ticonic National Bank?

A. When Financial Institutions acquired possession of the stock. I think the Directors' record would show that. It was prior to the date of the take-over, if that is what you mean?

XQ. That is exactly what I mean. And may we have it understood that he became a director of the Ticonic Bank November 20th, 1930, and became president ~~July~~ January 13, 1931?

A. Yes.

XQ. I'm sorry that record isn't here—By Gorry, I guess it is here.

A. Well, if it is here it is in that book. (Counsel and witness examine papers.)

XQ. Now, Mr. Picher, I hope we can avoid the necessity [fol. 32] of sending for the book which my brother inadvertently left behind. Did you find among the books that you took over as receiver a bond register?

A. I did.

XQ. And whether or not you found in that bond register a record of $20,000, Kingdom of Denmark bonds, No. M-11022 to M-11041, External Sixes, of 1942, purchased August 3, 1931, from Ticonic National Bank?

A. Right.

XQ. And do you find on the register—And was that the register formerly of the Ticonic National Bank?

A. Yes.

X Q. And did it pass into the hands of the Peoples Bank?
A. Yes.
X Q. And then passed into your hands as receiver?
A. Yes.
X Q. And whether or not with the record of those bonds you found this entry "In trust Box No. 1080"?
A. Yes. Right.
X Q. What did you do with those bonds?
A. I sent them to the Special Liquidator of Securities, Dr. Paul W. Atkins, Federal Reserve Bank, New York City.
X Q. And sold them?
A. Yes.
X Q. Now then, perhaps it will save a little time—Whether or not in the record of the Directors of the Ticonic National Bank, under date of June 6th, 1929, you find this record: "Upon motion duly seconded it was voted to segregate and deposit with the Trust Department $20,000. Kingdom of Denmark 6s, due 1942."
A. That is right.
X Q. And those are the same Kingdom of Denmarks which you subsequently received and sold?
A. I believe they are, Yes, sir.
X Q. You believe they are?

The Court: Let me ask; did the Peoples-Ticonic take over the books of the Ticonic Bank?
A. No.
The Court: They didn't?
A. They did take over that bond register because I imagine it had a better cover on it than the other. And they used it for all the bonds.
The Court: Did the Peoples-Ticonic take over an individual deposit ledger, so-called?
A. No, sir. Distinctly separate.
The Court: Did they take over any trust records of the Ticonic?
A. No. Nothing in the Peoples-Ticonic other than that checking-account, to indicate the existence of the Ticonic trust.
[fol. 33] The Court: Now when you had this money—this ten thousand dollars—you had it on your individual deposit ledger?
A. Yes. It was kept on those ledger cards.
The Court: You call that the individual deposit ledger?

A. They didn't keep a ledger.

The Court: Didn't they keep a big ledger?

A. No. That is the record. Those ledger cards.

The Court: Didn't they have a great big book——

A. No. A Boston Ledger? No. They don't do that any more. That (indicating) is a bookkeeping machine.

The Court: That is the original account there?

A. Yes. Well, I don't know how original it is. It goes way back.

The Court: I mean original entry.

A. Yes.

The Court: Of course you didn't receive any one sum of money distinct from any other sum. I suppose you received from the Ticonic a large sum of money.

A. From the Ticonic.

The Court: Did the Peoples-Ticonic receive cash?

A. Ten thousand and some dollars in cash on the day of the take-over.

The Court: That wasn't all the cash they received?

A. No. That was the cash for the Ticonic National Bank Trust.

The Court: It was all in one lump?

A. When they took over the assets——

The Court: Did they take that sum over as a separate fund?

A. As far as I can see from the record. The credit was made on the account.

The Court: How did that ten thousand dollars come into the possession of the Peoples-Ticonic?

A. As a commercial——

The Court: No. How did the cash come in?

A. No different than any other money. It was all together. As a matter of fact there wasn't any money when I got there. We had some notes to pay,——

The Court: I am talking about the Peoples-Ticonic?

A. That is what I mean. It was general cash.

The Court: The Peoples-Ticonic took over this other bank in 1931?

A. Yes.

The Court: Of course I am talking about 1931 when this merger took place.

A. Yes.

[fol. 34] The Court: They took over obligations of the other bank, didn't they?

A. They assumed some of the liabilities.

The Court: They took over all the deposit liability?

A. Yes.

The Court: They agreed to pay all the depositors?

A. Yes.

The Court: Your position is that this is one of the depositors they agreed to pay?

A. Yes.

The Court: Off the record——

(Court and counsel confer.)

The Court: Having taken over this lump sum of something over ten thousand dollars—$10,127.66—which represented the amount of money previously in the Ticonic, which the Ticonic had held in trust and deposited in its commercial account to the credit of its trust department,—the Peoples-Ticonic having taken that over, did it exercise any discrimination when it received checks on that account from the previous trust officers of the Ticonic? Did it make any inquiries, or concern itself, with the question as to whether any one trust fund was overdrawn, or otherwise?

A. As far as I can see——

(Court and counsel confer, off the record.)

The Court: Take this. When you received this aggregate sum of money, or something over ten thousand dollars,—I mean the Peoples-Ticonic—the Peoples-Ticonic had no examination, I understand from what you say, as to the items making up that amount. That is right. The Peoples-Ticonic simply held itself in readiness to pay it on checks of the trust department of the Ticonic up to the total amount in that credit item?

A. Yes.

The Court: And when it got up to that much, you stopped?

A. Yes.

X Q. Do you remember, Mr. Picher, quite a long time ago, I was there and looked at these records with you?

A. Yes.

X Q. And found this vote: "Upon motion duly seconded it was voted to segregate and deposit with the trust department $20,000 Kingdom of Denmark 6s, due 1942."

A. Yes, I do.

X Q. And you had those bonds at that time?

A. Not in my possession.

X Q. Where were they?

A. They were with the Special Liquidator of Securities, for sale.

[fol. 35] X Q. You knew then that they bore a mark "In trust Box 1080"?

A. Well, I did then. Yes.

X Q. And they were then with the liquidating agent for sale?

A. Yes.

(Defendant's Exhibits 4 and 5 marked.)

X Q. When were those Kingdom of Denmarks sold?

Mr. Dubord: I haven't any information.

The Court: Off the record——

(Conference.)

The Court: I understand, Mr. Picher, that when these Denmark bonds which had previously been held by the Ticonic as security for its trust funds were taken by you and sent to New York for sale and subsequently sold that the proceeds were segregated to take the place of the bonds?

A. Yes.

The Court: For the purpose of securing any trust liens that might be against those proceeds?

A. In the Peoples Bank. The Peoples-Ticonic.

The Court: Do you mean to say that after the bonds came into the possession of the Peoples-Ticonic that they used them as security for their own obligations?

A. Along with about $175,000. worth of other bonds. They were amongst the bonds segregated to secure these trusts.

The Court: And they put them with their own bonds?

A. Yes.

The Court: And segregated them to secure their own trust obligations?

A. Yes.

The Court: In that total of their own trust obligations was this ten thousand dollars included?

A. No. It never was included as a trust account.

The Court: I misunderstood you.

X Q. When were those bonds segregated by the Peoples-Ticonic?

A. I couldn't tell you without the bond register.

X Q. Have you any such record?

A. In the bond register. We have to pick them out individually.

X Q. I asked you when those Kingdom of Denmark bonds were segregated by the Peoples-Ticonic?

A. I don't know.

X Q. Were they ever?

A. Yes.

[fol. 36] X Q. How do you know?

A. Because they were segregated in the box, along with the other bonds that were segregated to secure Peoples-Ticonic trusts.

X Q. You had the bond register which showed that they were segregated in box 1080?

A. Yes.

X Q. Wasn't that a Ticonic box?

A. There was no such thing as a Ticonic box at that time.

X Q. When was that entry "In trust box—" put on that register?

A. I don't know.

X Q. Was it put on before it came into your hands?

A. Yes.

X Q. Don't you think—Well, I don't know as I care what you think. What is there to show that these bonds had been segregated by the Peoples-Ticonic?

A. The only thing that there was to show was that they were listed as segregated bonds along with the other bonds——

X Q. Listed where?

A. In the receiver's receipt that I received.

X Q. Who with?

A. The conservator. And they were segregated with the other bonds on that list in a trust box.

X Q. And they came into your hands as segregated bonds?

A. Yes.

The Court: Segregated to secure the trust obligations of the Peoples-Ticonic?

Mr. Eaton: Yes, sir. But there is the vote of the Ticonic which owned them at the time the vote was passed that they were segregated for the Ticonic; and this action is against the Ticonic.

Mr. Dubord: It is against the Peoples-Ticonic.

Mr. Eaton: This bill in equity is against the Ticonic National Bank of Waterville.

The Court: Have you any assets of the Ticonic?

A. No cash.

The Court: What have you got?

A. We have collection of rents from their real estate. We have their real estate. We have twelve pieces of real estate.

The Court: This may be an obligation against the Ticonic.

X Q. How much cash was received by the Peoples from the Ticonic at the time of the sale in August, 1931?

A. How much cash received by the Ticonic?

[fol. 37] X Q. No. Received by the Peoples from the Ticonic?

A. I can't tell you that here. I couldn't tell you the cash on hand in the Ticonic on that date.

The Court: Off the record——

(Conference between Court and counsel.)

* * * * * * *

The Court: Well, have you got in all the evidence you want to offer?

Mr. Dubord: I wanted to introduce these two papers. Plaintiff's 4 and 5.

Mr. Eaton: No question about them. No objection. I don't see what bearing they have.

Mr. Dubord: Number 4 is a list of the so-called Ticonic trusts, including the Sprague Trust as of the date of consolidation on August 3rd, 1931, Exhibit 5 being a similar list as of March 4th, 1933.

The Court: Admitted.

(Hearing closed at 3.45 p. m.)

Certificate

I certify that the foregoing is a correct transcript of my short-hand notes taken at the time and place and in the above described matter.

O. D. Hooper, Shorthand Reporter, U. S. Courts.

Portland, Maine, 11th March, 1936.

[fol. 38] **Plaintiffs' Exhibits**

EXHIBIT "A"

F. Harold Dubord, Attorney and Counsellor at Law
101 Main Street, Waterville, Maine

Sept. 24, 1935.

Harvey D. Eaton, Esq., Attorney at Law, Waterville, Maine.

DEAR MR. EATON:

Kindly pardon the long delay in answering your letter of July 30th, in which you asked if we could agree at the trial of the Sprague case that at a meeting of the Directors of the Ticonic National Bank, at which Mr. Vigue was present, on April 2nd, 1931, a vote was passed as follows:

"Upon motion, it was voted to confirm the action of Mr. Boutelle in accepting in behalf of the bank, the Sprague trust dated March 28, and to authorize the trust officer to carry out the provisions contained therein."

I have just examined the records in question, and find that this vote is on record, so I shall be pleased to agree to its admission.

Yours very truly, F. Harold Dubord.

FHD:P.

EXHIBIT "B"

Omitted from printed record. See stipulation, side folio 47.

[fol. 39] **Defendants' Exhibits**

EXHIBIT 1

This Memorandum of Agreement made this third day of August, A. D. 1931, by and between "The Ticonic National Bank of Waterville" of Waterville in the County of Kennebec and State of Maine, a national banking association duly organized under the laws of the United States of America and hereinafter for convenience referred to as the

"Ticonic Bank" and "The Peoples National Bank of Waterville" of said Waterville, likewise a national banking association existing under the laws of the United States of America hereinafter for convenience referred to as the "Peoples Bank."

Witnesseth:

Whereas, the said Ticonic Bank has certain loans which can not be promptly realized upon and has suffered a large depreciation in its bond and investment accounts to the extent that its surplus and undivided profits have been entirely lost and its capital seriously impaired, and

Whereas, the liabilities of the Ticonic Bank consist for the most part of several million dollars due to depositors, whose demands may at any time cause embarrassment and loss and place said Ticonic Bank in a serious predicament, and.

Whereas, the Treasury Department of the United States of America insists that prompt action must be taken or it will be obliged to close and liquidate said Ticonic Bank, and

Whereas, under the foregoing circumstances the Directors of said Ticonic Bank deem it wise to enter into this agreement whereby all the depositors will be promptly paid or their accounts assured, and its known liabilities assumed by said Peoples Bank;

Now, Therefore, the said Ticonic Bank and said Peoples Bank *Bank* mutually agree as follows:

First. Said Peoples Bank will assume or pay all the indebtedness of said Ticonic Bank to its depositors as shown [fol. 40] by its books, together with any other usual current liabilities not to exceed five thousand dollars ($5,000.), and redeem its circulating notes.

It will take over from said Ticonic Bank all deposits of said depositors and at the election of depositors receive them as such or pay them in full the amount of their deposits. The gross amount of deposits so taken over and assumed as of August 1, 1931, is $4,207,127.12 and is to be revised as of the close of business August 3, 1931.

Second. Said Ticonic Bank shall pay said Peoples Bank for its assumption of said liabilities by the transfer of the following listed assets of said Ticonic Bank:

A. 180 shares of the capital stock of the Federal Reserve Bank of Boston, or the amount realized on the surrender thereof.

B. All the checks, currency or other cash items on hand at the close of business August 3, 1931.

C. The banking house, furniture and fixtures, equipment and supplies.

D. All other bonds, stocks and securities of the bank not including other real estate owned or customers' notes, excepting however such bonds and stocks as are specifically listed in Schedule F attached hereto. Said bonds, stocks, and securities being specifically listed in Schedule D-1 hereto attached.

E. All the notes and mortgages of said Ticonic Bank, except such as are specifically set forth in a schedule marked Schedule F attached hereto.

Third. Said Schedules A, B and C shall be credited on the total amount due said Peoples Bank by reason of said assumption of the liabilities of said Ticonic Bank at the book value of all the items contained in said Schedules A, B and C as of the close of business August 3, 1931, plus accrued dividends, if any, on said Federal Reserve Bank stock. The items in Schedule D, specifically listed in D-1 shall be credited at the price at which the same can be sold on August 3, 1931, such possible price to be determined by said Peoples Bank, but said Ticonic Bank, or its assigns, [fol. 41] shall have the right to buy for cash any of said items at the sale price so fixed by giving notice of its, or their, intention so to do on or before August 6, 1931. The items in Schedule E shall be credited at the book value as of the close of business August 3, 1931, with interest or discount adjusted to said date.

Fourth. Said Peoples Bank agrees to allow said Ticonic Bank for the good will of its banking business and in consideration of the agreement of the officers and directors of the Ticonic Bank of their hearty co-operation and assistance in the securing and retention of deposits in said Peoples Bank, fifty thousand dollars ($50,000.), said sum to be deducted in ascertaining the amount of the note to be given said Peoples National Bank by said Ticonic Bank as more particularly set forth in the Fifth Article of this agreement.

Fifth. The total amount of all the items shown in said schedules A to E inclusive, plus the sum of fifty thousand dollars, the allowance set forth in the Fourth Article of this agreement, shall be deducted from the total of said known liabilities plus the five thousand dollars ($5,000.) above referred to, and for the balance so found to be due, said Ticonic Bank shall execute and deliver to said Peoples Bank its non-negotiable promissory note, due in two years from August 3, 1931, with interest at five per cent per annum, payable semi-annually, and as security therefor the said Ticonic Bank shall transfer to said Peoples Bank all other assets of the said Ticonic Bank of whatever name, nature or description, save only possible actions or causes of action, if any, against any of the officers or directors of said bank for mismanagement of its affairs, or violation of the National Banking Act not amounting to defalcation. All known assets so pledged are listed in Schedule F hereto annexed.

Sixth. Said Peoples Bank shall proceed with due and reasonable diligence to turn into cash all assets listed in Schedule F, crediting all amounts received on said note of August 3, 1931, to it from the Ticonic Bank. In so doing said Peoples Bank shall act in co-operation with and under the direction of a committee to consist of three to be designated by said Peoples Bank and two to be designated by [fol. 42] said Ticonic Bank. In the event of the death or incapacity of any member of said Committee, the vacancy on said committee so caused may be filled by the bank which made the original appointment. Said committee shall act by a majority, but shall not take action without conference with the appointees of said Ticonic Bank or their successors. Said Ticonic Bank, or any of its shareholders shall have the right to take over any of the assets in Schedule F on payment of the book value therefor, or at any lesser amount which may be agreed to by said committee. Said Peoples Bank shall also have the right to take over any of said assets, which said Ticonic Bank shall not have notified said committee that it desired to take over, at the book value or at such lesser value as may be agreed to by said committee, crediting the amount thereof upon said note. If on the due date of said note any of said assets shall not have been collected or otherwise disposed of, the same shall be sold at public auction in said Waterville, and the said

Ticonic Bank or any of its stockholders, or the said Peoples Bank shall have the right to bid therefor, payment to be made in cash. In the event that as a result of the liquidation of said assets said Peoples Bank receives more than enough to pay the amount of said note, with accrued interest thereon, said balance shall be paid in cash to the Ticonic Bank, or the liquidating agent appointed therefor. If the said Peoples Bank receives enough to pay said note before all the assets are disposed of, it shall forthwith turn over such other assets in Schedule F to said Ticonic Bank, or the liquidating agent appointed therefor. At the expiration of said two years, said Peoples Bank shall also credit on said note the amount by which the current liabilities not shown on the books fall below the five thousand dollars ($5,000.) arbitrary estimate above referred to.

Seventh. Interest to the date of collection, or transfer, as the case may be shall be credited on all such other assets in Schedule F, and in determining the amount of said note, interest shall also be accrued on all liabilities drawing interest at the rate thereof.

Eighth. The Peoples Bank in making such liquidation shall have the right to charge against said assets shown in [fol. 43] Schedule F all out of pocket expenses in connection with such liquidation, but shall not have the right to make any charge for its services in connection therewith.

Ninth. The Ticonic Bank warrants that it has good title to all the assets listed in said Schedules.

Tenth. It is distinctly understood and agreed that in the event such assets in Schedule F are not sufficient to pay the amount of said note and interest when liquidated as above provided, that the Ticonic Bank shall remain liable therefor and that any and all statutory liability for assessment on the part of any of the stockholders of said Ticonic Bank is hereby expressly retained and kept alive for that purpose. Said Peoples Bank agrees, however, that it will make no claim against any of the officers or employees of the Ticonic Bank by reason of any alleged improper management of the same or violation of the National Banking Act which does not amount to a defalcation and that said Peoples Bank will make no move to have any such claims taken into consideration in determining the amount of the statutory assessment against stockholders, if any.

Eleventh. It is contemplated that this transfer shall take effect August 3, 1931. If for any reason the transfer is delayed beyond that date it shall be made effective as near as may be as of that date, and any and all running expenses of the Ticonic Bank after that date shall be paid by said Peoples Bank which as of that date shall have the full right to fix the compensation of all officers and employees.

Twelfth. When, as and if said liquidation shall be fully completed the said Ticonic Bank will surrender its charter and go out of business. In the mean time said Peoples Bank is authorized in the event that it changes its name to use the word "Ticonic" as a part of the name of said bank in any way it desires. Said Ticonic Bank also agrees forthwith to take proper steps by way of vote of its stockholders or otherwise to accomplish this liquidation and specifically to ratify and confirm this agreement and any and all other agreements or legal instruments of whatever name and na-
[fol. 44] ture necessary or advisable in order to carry the same into effect according to its true intent and purpose.

In Witness Whereof the said The Ticonic National Bank of Waterville has caused these presents to be signed in its name and behalf and its corporate seal to be hereto affixed by Julian D. Taylor, its Vice-President and George H. Viles, its Cashier, both hereunto duly authorized, and the said The Peoples National Bank of Waterville has caused these presents to be signed in its name and behalf and its corporate seal to be hereto affixed by Charles W. Vigue, its President and William T. Johnson, its Cashier, both hereunto duly authorized, and all on the day and year first above written.

The Ticonic National Bank of Waterville, by Julian D. Taylor, Its Vice-President, by George H. Viles, Its Cashier. The Peoples National Bank of Waterville, by Charles W. Vigue, Its President, by William T. Johnson, Its Cashier.

EXHIBIT 2

Omitted from printed record. See stipulation, side folio 47.

EXHIBIT 3

Omitted from printed record. See stipulation, side folio 47.

[fol. 45] EXHIBIT 4

Ticonic National Bank

Cash balances of various trusts as of August 3, 1931.

Trust No.		
1	Jerry M. Cratty	$315.76
2	Ella W. Goding	452.98
4	Lottie F. Sprague	4,822.18
5	Sigma Kappa Convention	462.18
6	Myrtle Weeks	467.67
7	P. W. and H. O. Burrington	421.96
8	Estate Sarah J. Clarke	296.52*
9	Pauline Fowler	12.50
10	Ronello O. Jones	176.19
12	Sarah E. Percival	339.31
13	Frank Redington	560.95
14	Albert Wade	105.09
15	Albert & Katherine Wade	2,116.00
19	Ticonic Foot Bridge	171.41
	Cash balance as shown by Ledger Sheet Aug. 3, 1931	$10,127.66

* In Red.

[fol. 46] EXHIBIT 5

Ticonic National Bank

Cash balance of various trust as of March 4, 1933.
Date of suspension of Peoples-Ticonic National Bank.

Trust No.		
1	Jerry M. Cratty	$217.82
2	Ella W. Goding	507.40
4	Lottie F. Sprague	4,099.83
5	Sigma Kappa Convention	471.03
6	Myrtle Weeks	409.96
7	P. W. & H. O. Burrington	509.05
8	Estate Sarah J. Clarke	208.46*
9	Pauline Fowler	11.84
10	Ronello O. Jones	188.13
11	Charles W. Mower	1,919.69
12	Sarah E. Percival	1,277.05
13	Frank Redington	606.95
14	Albert Wade	108.09
15	Albert & Katherine Wade	2,197.21
19	Ticonic Foot Bridge	146.62
	Cash balance as shown by Ledger Sheet, March 4, 1933	$12,462.21

* In Red.

[fol. 47] IN UNITED STATES DISTRICT COURT

STIPULATION OMITTING PLAINTIFFS' EXHIBIT "B" AND DEFENDANTS' EXHIBITS 2 AND 3—Filed September 2, 1936

It is stipulated and agreed by the parties that Plaintiff's Exhibit B and Defendants' Exhibits 2 and 3 need not be printed on account of the practical impossibility of reproducing them, and that the original exhibits may be produced and used by either party at the argument. This stipulation shall be printed in lieu of said exhibits and entitled "Plaintiff's Exhibit B and Defendants' Exhibits 2 and 3."

Harvey D. Eaton, Attorney for Plaintiff. F. Harold Dubord, Attorney for Defendants.

Approved: J. A. P., U. S. D. J., 2 Sept., '36.

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed May 29, 1936

PETERS, D. J.:

This is a bill in equity brought to establish a priority claim on certain bonds or the proceeds thereof in the hands of the defendant Picher, as receiver of the defendant Peoples-Ticonic National Bank.

I find the following facts:

In March, 1931, the plaintiff, Lottie F. Sprague, deposited with the Ticonic National Bank of Waterville about $5,000 in trust to be invested by the bank as trustee and used for the purpose of making certain periodical payments to the other plaintiff, Margaret Davis Sprague. The bank had been authorized to act in a fiduciary capacity under the provisions of the Federal Reserve Act, and had, by proper votes, set up a trust department with adequate provisions for the protection of trust funds, including the provision that trust funds held by the bank awaiting investment or distribution, deposited in the commercial department of the [fol. 48] bank to the credit of the trust department, should be secured by securities equal in value to the amount of such deposited funds and delivered to the trust department to be held segregated from the general assets of the bank.

The bank accepted the Sprague trust, the terms of which were evidenced by a written memorandum, and deposited the money in its commercial or checking department to the credit of its trust department, with other funds awaiting investment or distribution, and secured the total amount of such funds by setting aside in the trust department bonds equal to or exceeding in value the amount of such total deposit, as provided by the by-laws of the bank and by the Federal Reserve Act. Included among the bonds thus segregated was a certain lot of $20,000 Kingdom of Denmark 6s, 1942.

In August, 1931, the Ticonic Bank discontinued its activities as an active banking concern, sold substantially all of its assets to the Peoples National Bank, and went into voluntary liquidation. The Peoples Bank agreed to assume and pay the liabilities of the Ticonic Bank to its depositors, but it does not appear that the Peoples Bank succeeded the old bank as trustee or expressly undertook any obligation

relative to the administration of its trusts. On the contrary, the old Ticonic Bank continued, through its officers, to exercise supervision over the trust accounts, including the Sprague account.

The total uninvested trust funds on deposit in the commercial department of the Ticonic Bank, when taken over by the Peoples Bank, amounted to about $10,000, and when the banks closed in 1933 to about $12,000. The sale to the Peoples Bank included the Ticonic banking house, furniture and equipment, and the new bank, taking the name of Peoples-Ticonic, occupied the quarters of the old Ticonic.

In 1931, prior to the acceptance of the Sprague trust by the Ticonic Bank, Mr. Charles W. Vigue, who was president and remained president of the Peoples Bank, was chosen president of the Ticonic and assumed active control and management of its affairs. Several other gentlemen were and remained directors of both banks, both of which were practically controlled by one stock ownership.

[fol. 49] The deposit in the Ticonic Bank to the credit of its trust department, after the sale to the Peoples Bank, was carried in the same way as before, even the same ledger sheets being used, it being impossible to distinguish, except by dates, the old account from the new.

The officers of the old Ticonic Bank, in handling this account of uninvested trust funds, continued to make deposits and draw checks as before. The checks, until the close of the banks in 1933, were even drawn on the Ticonic Bank by its trust officers and by Mr. Vigue, its president and trust officer, although the bank had gone out of business; but the checks were presented to and paid by the new bank in the old banking rooms. The Sprague account, which was never invested in any way by the Ticonic Bank as trustee, was thus finally drawn down to $3,649.65, which is the amount of the trust fund that should be in the hands of the trustee.

The Kingdom of Denmark bonds, which had been segregated by the Ticonic Bank to secure the uninvested trust funds on deposit in its commercial department to the credit of its trust department, were included in the sale of assets by the Ticonic to the Peoples Bank, delivered to and taken over by the latter bank. They were then treated by the new bank as its own property, segregated to secure its own trust funds as distinguished from the trust funds of the old bank, and subseqnently sold by the receiver.

As both banks had the same active president, who also participated as trust officer in the handling of the trust funds of the Ticonic Bank, both before and after the quasi consolidation, the officers of the Peoples-Ticonic Bank, which I have referred to as the new bank, had full knowledge of the situation concerning the trust funds of the old bank and the fact that the uninvested funds when turned over to the new bank were secured by these Kingdom of Denmark bonds.

Subsequent to the closing of the banks in 1933 the defendant Picher was appointed receiver of both banks.

Under the trust agreement with the plaintiffs, the Ticonic Bank as trustee was authorized to reserve $1,000 from invested funds and to deposit that amount in the savings department of the bank; but no such deposit was made, nor was any of the Sprague money ever invested, either [fol. 50] by deposit under the safeguards of the savings department or otherwise, but always remained among the uninvested trust funds.

In behalf of the defendants it is claimed that the deposit in the commercial or checking departments,—first, of the Ticonic and later of the Peoples-Ticonic, when that bank succeeded to the business of the Ticonic,—simply represented the obligation of debtor and creditor, and that the only rights of the persons interested in the deposit are to share in a distribution of general assets by the receiver; that the plaintiffs and others interested in the deposit are not entitled to a lien on the Denmark bonds or their proceeds, it being contended that while those bonds were segregated by the Ticonic for the purpose of securing uninvested funds, that the funds in question were not uninvested but were invested by depositing them in the commercial account of the Peoples-Ticonic Bank.

It is also contended that inasmuch as the trust agreement authorized the reservation of $1,000 from general investments and authorized its deposit in the savings department, that, in any event, $1,000 of the Sprague fund was a general deposit, regardless of the status of the balance.

My conclusions of law are not favorable to the defendants' contention. No doubt the banks,—first the Ticonic and then the Peoples-Ticonic,—were debtors for the amount of balances in their checking accounts to the credit of the trust department of the Ticonic. The owners of those bal-

ances had the benefit of the banks' implied promise to pay; but they also, admittedly, had the benefit of the security of the segregated bonds while the deposit was in the Ticonic, and must still have that benefit, unless something has happened since to deprive them of that protection. As nothing has occurred with their consent or participation it must be claimed, either that the so-called consolidation of the banks or the fact of receivership has changed their equitable rights.

The sale of these segregated bonds with the assets of the Ticonic to the Peoples, or the Peoples-Ticonic Bank, was not a sale to innocent third parties for value. The status of the bonds with reference to uninvested trust funds was perfectly well known to Mr. Vigue who was the chief executive officer of both banks and acted as trust officer of the [fol. 51] Ticonic. His knowledge affected the new bank as well as the old, and he could not by a mere sale of the bonds in the market divest himself or his bank of responsibility.

Under the situation disclosed the new bank took and held the trust deposit, with the bonds that had been set aside to secure it as provided by law, subject to the same obligations and with the same status as before.

The argument that when the funds were in the checking department of one bank they were uninvested and that when they turned up in the checking department of another bank they became invested funds, does not impress me. I hold that their status was not changed by the so-called consolidation.

The only other thing that has occurred is the receivership; but the receiver took over the assets of the closed bank subject to all the existing rights and equities. Scott v. Armstrong, 148 U. S., 499. In the above case the Court said:

"It is insisted that the assets of the bank existing at the time of the act of insolvency include all its property without regard to any existing liens or set-offs thereto. We do not regard this position as tenable. * * * Liens, equities or rights arising by express agreement or implied from the nature of the dealings between the parties or by operation of law prior to insolvency, and not in contemplation thereof, are not invalidated."

Scudd v. Tillinghast, 191 Fed. 1. In the latter case the Circuit Court of Appeals held that the receiver of a na-

tional bank cannot lawfully appropriate to the use of the bank or its creditors any seeming assets that in equity and good conscience belongs to another or ought not to be enforced against him. Whittnebel v. Loughman, 9 Fed. Supp. 465.

I conclude that the plaintiffs, in common with others in the same situation, had an equitable lien on the Denmark bonds while in the possession of the Peoples-Ticonic Bank and while in the possession of its receiver, and, as the proceeds of those bonds sold by the receiver augmented the funds in the hands of the receiver the same lien extends to the proceeds of the bonds. As the total amount of all trust funds on deposit was less than the proceeds of the [fol. 52] bonds sold, the plaintiffs here are entitled to payment in full of $3649.65 with interest from the date of the bill and with costs.

A decree may be entered accordingly.

In United States District Court

Final Decree—Filed June 6, 1936

This cause came on for hearing this day and was heard upon bill, answer, proofs and briefs and thereupon upon full consideration thereof it is ordered, adjudged and decreed

1. That plaintiffs' bill be sustained.

2. That defendant, Arthur G. Picher, Receiver of Peoples Ticonic Natl. Bank, pay to plaintiffs $3649.65 with interest from July 30, 1935.

3. That defendant, Arthur G. Picher, Receiver, pay plaintiffs their taxable costs, and that execution issue accordingly.

John A. Peters, Judge U. S. District Court.

June 2, 1936.

Seen and agreed to: ——, Attorney for defendants.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

The petition for appeal is dated August 7, 1936, and was filed and allowed by Judge Peters on August 8, 1936. Appeal to act as supersedeas, no bond being required as appeal is taken by direction of Comptroller of the Currency.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 8, 1936

And now on this, the seventh day of August, A. D. 1936, came the defendants, by their solicitor, F. Harold Dubord, [fol. 53] of Waterville in the County of Kennebec and State of Maine, and say that the final decree entered in the above cause on the sixth day of June, A. D. 1936, is erroneous and unjust to the defendants:

1. Because the Court erred in finding that the relationship of trustee and cestui que trust existed between the Peoples-Ticonic National Bank and/or the Ticonic National Bank and the plaintiffs in relation to funds left by the plaintiff, Lottie F. Sprague, with the Ticonic National Bank.

2. Because the Court erred in failing to find that only a relationship of debtor and creditor existed between the plaintiffs and the defendant banks in relation to the funds left with the Ticonic National Bank by the plaintiff, Lottie F. Sprague.

3. Because the Court erred in its conclusion that the funds in question remained among the uninvested trust funds of the Ticonic National Bank.

4. Because the Court erred in its conclusion that the funds in question were secured by the Kingdom of Denmark bonds previously segregated by the Ticonic National Bank to secure the uninvested trust funds of the Ticonic National Bank,

5. Because the Court erred in its conclusion that the sum of three thousand six hundred forty-nine dollars sixty-five ($3649.65) cents was secured by the Kingdom of Denmark

bonds sold by the Ticonic National Bank to the Peoples-Ticonic National Bank.

6. Because the Court erred in its conclusion that the plaintiffs are entitled to interest from July 30, 1935.

7. Because the Court erred in its finding that the defendant, Arthur G. Picher, Receiver of both banks, should pay to the plaintiffs the sum of $3649.65.

8. Because the finding of the Court is entirely unwarranted by the evidence.

9. Because the Court erred in failing to give consideration to the legal requirements necessary for the establishment of a priority against the Receiver of an insolvent national bank.

[fol. 54] 10. Because the Court exceeded its powers in relation to the form and substance of the decree.

11. Because the Court erred in entering a decree to the effect that the plaintiffs recover their costs to be taxed by the Clerk for which execution may issue.

12. Because the decree is against the law and the evidence in the case.

13. Because the Court erred in its conclusion that the plaintiffs were entitled to an equitable lien on the Kingdom of Denmark bonds while in the possession of the Peoples-Ticonic National Bank and while in the possession of its Receiver.

14. Because the Court erred in its conclusion that the plaintiffs were entitled to priority in the special fund of one thousand ($1,000) dollars.

Wherefore the defendants pray that said decree be reversed and the Circuit Court of Appeals directed to dismiss the bill.

F. Harold Dubord, Solicitor for Defendants.

F. Harold Dubord, Waterville, Maine.

IN UNITED STATES DISTRICT COURT

BOND ON APPEAL

The appeal is allowed without requirement of security, in accordance with Section 870 of Title 28, of the Code of Laws of the United States.

CITATION ON APPEAL

The Citation is dated August 8, 1936. Service thereof was made August 21, 1936.

[fol. 55] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed August 11, 1936

To the Clerk of the United States District Court, District of Maine, Federal Building, Portland, Maine.

SIR:

In preparing the transcript of record in the above entitled cause for transmission to the United States Circuit Court of Appeals for the First Circuit, please include:

1. Bill of complaint filed in Southern Division of United States District Court for the District of Maine.
2. Answer of defendants.
3. Statement of evidence.
4. Plaintiffs' exhibits A and B.
5. Defendants' exhibits 1-5 inclusive.

5a. Stipulation in regard to Plaintiffs' exhibit B and Defendants' exhibits 2 and 3.

6. Opinion of his Honor, Judge John A. Peters, handed down May 29, 1936.
7. The final decree sustaining the bill of complaint entered June 6, 1936.
8. The petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Citation in appeal with return of service thereon.

12. Copy of this præcipe.
13. Clerk's certificate.

Respectfully, F. Harold Dubord, Solicitor for Defendants.

Copy of the above præcipe received August 10, 1936.
Harvey D. Eaton, Solicitor for Plaintiffs.

Agreed to:
Harvey D. Eaton, Solicitor for Plaintiffs.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

[Memorandum.—An order of enlargement of time for docketing case to, and including, October 17, 1936, is here omitted. A. I. Charron, Clerk.]

[fol. 57] In United States Circuit Court of Appeals for the First Circuit, October Term, 1936

No. 3192

Ticonic National Bank et al., Defendants, Appellants,

v.

Lottie F. Sprague et al., Plaintiffs, Appellees

Appeal from the District Court of the United States for the District of Maine

Before Bingham, Wilson and Morton, JJ.

Opinion of the Court, on Rehearing—June 1, 1937

Bingham, J.:

This is an appeal from a decree of the federal District Court for Maine sustaining the plaintiffs' bill in equity and ordering the defendant Pitcher, the receiver of the Peoples National Bank, to pay to the plaintiffs the sum of $3649.65,

with interest from July 30, 1935, the date of the bill of complaint, with costs.

The bill was brought by Lottie F. Sprague and her daughter, Margaret Davis Sprague, against the Ticonic National Bank, the Peoples National Bank, and Arthur D. Pitcher, receiver of both banks, to establish the validity of a trust agreement dated March 28, 1931, entered into between the plaintiff Lottie F. Sprague and the Ticonic National Bank as trustee, and to assert a lien upon certain Kingdom of Denmark bonds aggregating $20,000, held as security for the performance of the trust agreement.

[fol. 58] From an early day there had existed in Waterville, Maine, two national banks, one known as the Ticonic National Bank, and the other as the Peoples National Bank. In December, 1926, the Federal Reserve Board authorized the Ticonic Bank to act in a fiduciary or trust capacity as provided in Title XII, U. S. C., Section 248 k, and on that day the directors of the Ticonic Bank established a trust department and adopted by-laws for its management, by which they established adequate provisions for the protection of trust funds, including the provision that trust funds held by the bank and "awaiting investment or distribution" if deposited in the commercial department of the bank to the credit of the trust department, the bank "should first deliver to the trust department, as collateral security, United States bonds or other marketable securities owned by the bank, * * * at least equal in market value to the amount of the funds deposited," and also as required by Section 248 k.

On March 28, 1931, the plaintiff, Lottie F. Sprague, delivered to the trust department of the Ticonic Bank $5022.18 to establish a trust fund for the benefit of her daughter Margaret under a written agreement setting forth the terms of the trust. By its terms, the trustee was authorized to invest the money in such "*bonds or securities*" as in its discretion it might determine, and to deposit in its savings department out of said sum at least $1000. And the trustee agreed to collect the income, interest and dividends, and on the first banking day of each month, beginning April 1, 1931, pay to the daughter Margaret the sum of fifty dollars from the fund and accumulations until the sum and accumulations were exhausted, etc. The Ticonic Bank accepted the trust and deposited the money in its commercial checking department to the credit of its trust department, with

other trust funds awaiting investment or distribution, and secured the total amount of such funds by setting aside in the trust department bonds equal to or exceeding in value the amount of such total deposits, as provided by the by-laws of the bank and the Federal Reserve Act. Included among the bonds thus segregated was a certain lot of $20,000 Kingdom of Denmark 6s, 1942.

[fol. 59] August 3, 1931, the Ticonic Bank ceased to do business as an active banking concern, sold substantially all of its assets to the Peoples National Bank, and went into voluntary liquidation. In the agreement of sale, the Peoples Bank assumed and agreed to pay the liabilities of the Ticonic Bank to its depositors, but it does not appear that the Peoples Bank succeeded the Ticonic Bank as trustee or expressly undertook the administration of the latter's trusts. The evidence showed that the Ticonic Bank, through its officers, continued to exercise supervision over the trust accounts, including the Sprague account. But that, early in 1931, prior to the acceptance of the Sprague trust by the Ticonic Bank, Mr. Charles W. Vigue, who was president and remained president of the Peoples Bank, had become president and director of the Ticonic Bank and an officer of its trust department; that he assumed active management and control of the latter bank's affairs; that several other gentlemen were and remained directors of both banks; and that both banks were practically controlled by one stock ownership.

After the sale of the assets of the Ticonic Bank to the Peoples Bank, the deposits in the commercial account of the Ticonic Bank, to the credit of its trust department, were carried on the books of the Ticonic Bank in the same way as before, but the funds ($10,127.66) were deposited in the commercial account of the Peoples Bank, and the officers of the Ticonic, in handling this account of the uninvested trust funds, continued to make deposits and draw checks as before. Even down to the close of the banks in 1933, the president and trust officers of the Ticonic Bank drew checks on that bank although it had gone out of business; the checks, however, were presented to and paid by the Peoples Bank in the old banking rooms of the Ticonic which the Peoples Bank had taken over. The Peoples National Bank and the Peoples-Ticonic National Bank are the same thing—a mere change of name.

The Sprague account, which was never invested in any way by the Ticonic Bank as Trustee, was finally drawn down to $3649.65, which is the amount of the trust fund that should be in the hands of the trustee. None of the uninvested trust [fol. 60] funds, either of the Sprague trust or the other trust was on deposit in the Peoples Bank (then called Peoples-Ticonic) to the credit of the trust department of the Ticonic Bank at the time the banks were taken over by the receiver.

The Kingdom of Denmark bonds, which had been segregated by the Ticonic Bank to secure its uninvested trust funds, were included in the sale of assets by the Ticonic Bank to the Peoples Bank, and delivered to and taken over by it. The bonds were treated by the Peoples Bank as its own property. It set them apart to secure its own trust funds as distinguished from the trust funds of the Ticonic Bank, and they were subsequently sold by the receiver for $20,722.66, which fund is now held by him.

It is also found that, as both of the banks had the same active president, who also participated as trust officer in the handling of the trust funds of the Ticonic Bank, both before and after the quasi-consolidation, the officers of the Peoples or Peoples-Ticonic Bank had full knowledge of the situation concerning the trust funds of the Ticonic and that its uninvested trust funds, at the time and before they were turned over to the Peoples, were secured by the Kingdom of Denmark bonds; that, although the Ticonic Bank, as trustee, was authorized to reserve $1000 from the trust fund and to deposit that amount in its savings department, no such deposit was made; that none of the Sprague money was ever invested, either by deposit under the safeguards of the savings department, or otherwise, but always remained among the uninvested trust funds; that the banks were closed March 4, 1933, and Mr. Pitcher was later appointed receiver of both banks.

The evidence also tends to show that the amount derived from the sale of the Kingdom of Denmark bonds by the receiver is sufficient to pay all the trust moneys deposited in the trust department of the Ticonic Bank at the time the banks were taken over by the receiver, together with interest from that date.

The above statement embodies the facts as found by the District Court and approved or found by this court.

The plaintiffs are not here seeking to establish a claim as general creditors against the assets of either of the two

[fol. 61] banks that came into the hands of the receiver in trust for general creditors. What they are seeking to do is to establish a trust agreement with the Ticonic Bank under which a fund was deposited by the plaintiffs in the trust department of that bank, which fund it never invested and no part of which was deposited in its savings department, but all put into its commercial account and used in its general banking business; and assert a lien upon the bonds pledged as security therefor.

Under the terms of its by-laws and Section 248 k, if the Ticonic Bank deposited the trust fund in its commercial account for use in the conduct of its general business, it was required to "first set aside in * * * [its] trust department United States bonds or other securities approved by the Board of Governors in the Federal Reserve System," and, in the event of the bank's failure, the owners of such fund by Section 248 k were given "a lien on the bonds or other securities so set apart, in addition to their claims against the estate of the bank." And, inasmuch as the plaintiffs' trust deposits were never invested by the Ticonic Bank and no part of them was deposited in the savings department, but were used by it in the conduct of its business, the plaintiffs acquired a lien on the bonds segregated to secure the deposit, in addition to any claim they might have as general creditors against the estate of the bank held by the receiver.

The plaintiffs did not lose their lien on the bonds by virtue of the attempted sale of them by the Ticonic to the Peoples Bank, for the Peoples Bank knew that the bonds had been segregated to secure the payment of uninvested trust deposits and took them charged with a trust or lien to secure those deposits. The trust deposits were never invested by the Ticonic Bank within the terms of the trust agreement. Their later deposit on or about August 3, 1931, in the commercial account of the Peoples Bank was not such an investment and the lien on the segregated securities was never in any way discharged. The receiver acquired no greater rights in the Kingdom of Denmark bonds than the Peoples Bank had by its colorable purchase of them from the Ticonic. And the bonds, having been [fol. 62] segregated in the latter's trust department to meet the requirements of Section 248 k and its own by-laws, the Peoples Bank and the receiver took them charged with the trust as above stated. Burrowes v. Nimocks, 35 Fed. (2d)

152, at 159; Schumacher v. Eastern Bank & Trust Co., 52 Fed. (2d) 925, at 928-929.

The receiver sold the bonds for $20,722.66, which sum he now holds apart from the general assets of the banks. That sum is nearly twice the amount of the trust deposits of all the depositors, including the plaintiffs', and undoubtedly more than sufficient to pay the claims of all the depositors with interest. Consequently we see no reason why the plaintiffs should not recover the amount due at the time the bank was taken over by the receiver, with interest and costs as allowed by the District Court.

In saying this we are aware that if the plaintiffs were seeking to establish a claim against the general funds of an insolvent national bank, they could not be allowed interest after the bank was taken over by the receiver, as the requirement of a ratable distribution precludes, in such case, the recovery of interest. But this is not such a case. The funds out of which the plaintiffs and other similarly situated claim payment are trust funds set apart from the general assets of the banks and in which the general creditors have no rights until after the secured claims are paid.

Our prior order in this case of January 15, 1937, is vacated and the order is:

The decree of the District Court is affirmed with costs.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL AS TO HEARING

On January 6, 1937, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on January 15, 1937, the following Per Curiam was filed:

IN UNITED STATES CIRCUIT COURT OF APPEALS

PER CURIAM—January 15, 1937

We are of the opinion that the decree of the District Court is correct except so far as it allows interest; that in allowing

interest from July 30, 1935 (the date of the bringing of the bill of complaint) the court erred.

The decree of the District Court is modified by striking therefrom the words "with interest from July 30, 1935", and so modified is affirmed, with costs to the appellees in this court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—January 15, 1937

This cause came on to be heard January 6, 1937, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 15, 1937, here ordered, adjudged and decreed as follows: The decree of the District Court is modified by striking therefrom the words "with interest from July 30, 1935", and so modified is affirmed, with costs to the appellees.

By the Court.

Arthur I. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL AS TO PETITIONS FOR REHEARING, ETC.

Thereafter, to wit, on April 5, 1937, upon petitions for rehearing filed by both parties, mandate which issued to the District Court on February 15, 1937, was recalled and an order entered for reargument.

Thereafter, to wit, on April 23, 1937, this cause came on to be heard on reargument and was fully heard by the court, [fol. 64] Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on June 1, 1937, an order vacating the final decree of January 15, 1937, was entered, the opinion of the court on rehearing (page 57) was filed and the following Final Decree was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

FINAL DECREE—June 1, 1937

This cause came on to be heard January 6, 1937, and April 23, 1937, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 1, 1937, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed with costs.

By the Court.

Arthur I. Charron, Clerk.

RECITAL AS TO STAY OF MANDATE

Thereafter, to wit, on June 29, 1937, upon motion of appellants, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, limited to the question as to the allowance of interest.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,855. U. S. Circuit Court of Appeals, First Circuit. Term No. 374. Ticonic National Bank, Peoples-Ticonic National Bank, et al., petitioners, vs. Lottie F. Sprague and Margaret Davis Sprague. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1937. Term No. 374, O. T., 1937.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 374

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER, AS RECEIVER OF BOTH SAID BANKS,
Petitioners,

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

F. HAROLD DUBORD,
Attorney for Petitioners.

GEORGE P. BARSE,
TREVOR V. ROBERTS,
Attorneys for the Comptroller of the Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No.

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER, AS RECEIVER OF BOTH SAID BANKS,
Petitioners,

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Your petitioners, Ticonic National Bank, Peoples-Ticonic National Bank, and Arthur G. Picher as Receiver of both said banks by appointment of Comptroller of the Currency, respectively pray that a writ of certiorari issue to review

the final decree of the United States Circuit Court of Appeals for the First Circuit, rendered in the above case on June 1, 1937 (R. 64).

Opinions of the Courts Below.

The opinion of the United States District Court for the District of Maine appears on pages 47-52 of the record and is reported in 14 Fed. Supp. 900. The *per curiam* opinion of the Circuit Court of Appeals affirming the original decree of the District Court but striking out the allowance of interest subsequent to the date of insolvency appears on page 63 of the record and is reported in 87 F. (2d) 365. The opinion of June 1, 1937, of the Circuit Court of Appeals upon rehearing appears on pages 57-62 of the record and is reported in 90 F. (2d) 641.

Jurisdiction.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on June 1, 1937 (R. 64). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (U. S. Code, Title 28, Sec. 347.)

Summary Statement of the Matters Involved.

On July 29, 1935, the respondents as plaintiffs filed in the District Court of the United States for the District of Maine their bill of complaint against Ticonic National Bank, Peoples-Ticonic National Bank, and Arthur G. Picher as Receiver of both banks (R. 2). The bill alleged in substance that plaintiffs had delivered to the Ticonic National Bank, prior to its insolvency, the amount of $5,022.18, under a certain trust agreement. Under the bill, the plaintiffs sought to establish a lien on certain bonds or the proceeds thereof, which bonds had originally been segregated

by the Ticonic National Bank to secure the aforesaid, and other trust funds which the bank received in its Trust Department, but which it had deposited in the Commercial Department of the bank under the provisions of Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. C.

Previous to August 3, 1931, there were two national banks in Waterville, Maine,—the Ticonic National Bank and the Peoples National Bank. On that date the Ticonic National Bank sold practically all of its assets to the Peoples National Bank under the provisions of a contract by which the Peoples National Bank undertook and agreed to pay the deposit liabilities of the Ticonic National Bank in full (R. 39). The Peoples National Bank then changed its name to the Peoples-Ticonic National Bank. The Ticonic National Bank then went into voluntary liquidation under Section 5220, U. S. R. S. (U. S. C., Title 12, Sec. 181) (R. 48).

Included in the deposit liabilities assumed by the Peoples National Bank was an account reflecting a balance of $10,127.66. This was the account in which the Ticonic National Bank, as fiduciary, carried its uninvested trust funds deposited in the Commercial Department under the permissive provisions of Section 11 (k) of the Federal Reserve Act, 248 (k), Title 12, U. S. Code. Included in the total due the several trust estates was an item of $4,882.18, which represented the balance due on the Lottie F. Sprague trust. After August 3, 1931, the Ticonic National Bank no longer operated as a going commercial bank but did retain its Trust Department and continued to perform its functions as fiduciary of trust estates; and as funds were collected belonging to the respective trusts it deposited same in the aforesaid checking account which it carried in the Peoples-Ticonic National Bank. From time to time, as funds were needed for distribution in connection with the respective trust estates being administered by the Ticonic National Bank, said bank drew its trust checks upon itself (R. 49) which, when presented to the Peoples-Ticonic National

Bank, were charged against the above-mentioned checking account in the Peoples-Ticonic National Bank. Several such withdrawals were effected by checks payable to the beneficiaries of the Lottie F. Sprague trust so that as of the date suit was brought the balance due was $3,649.65.

When the above-mentioned checking account was carried in the Ticonic National Bank while it was a going concern, and previous to the aforesaid sale of its assets on August 3, 1931, it was secured by certain Kingdom of Denmark bonds in the principal amount of $20,000 segregated in the Trust Department of said bank consistent with the previsions of Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. C. On August 3, 1931, when the Peoples National Bank purchased substantially all of the assets and assumed all of the deposit liabilities of the Ticonic National Bank, the Kingdom of Denmark bonds were included in the assets purchased. On March 4, 1933, the Peoples-Ticonic National Bank suspended and for awhile was in conservatorship, and later, November 6, 1933, the petitioner, Arthur G. Picher, was appointed receiver (R. 4). At the date of suspension the amount on deposit in the commercial checking account of the Peoples-Ticonic National Bank to the credit of the Ticonic National Bank as trustee of the various trusts, including the Sprague trust, was $12,462.21 (R. 46). The amount then due on the Lottie F. Sprague trust was $4,099.83 (R. 46), which amount was later reduced by payments made by the conservator, to $3,649.65 (R. 49). Between the dates of August 3, 1931, and June 28, 1934, the Ticonic National Bank was in voluntary liquidation. On the latter date your petitioner, Arthur G. Picher, was appointed receiver of that bank also (R. 4). The Kingdom of Denmark bonds were subsequently sold by the receiver of the Peoples-Ticonic National Bank for an amount in excess of $20,000.

The District Court rendered an opinion on May 29, 1936, (R. 47), holding that respondents were entitled to payment of the sum of $3,649.65 in full, with interest from the date

of the filing of the bill of complaint, and with costs. On June 6, 1936, a final decree was entered by the District Court sustaining the plaintiffs' bill and ordering the defendant, as Receiver of the Peoples-Ticonic National Bank, to pay plaintiffs the sum of $3,649.65 with interest from July 30, 1935, and providing that execution issue accordingly (R. 52).

Your petitioners appealed to the Circuit Court of Appeals for the First Circuit, which court, in a *per curiam* dated January 15, 1937, modified the decree by striking out the words "with interest from July 30, 1935," and as so modified affirmed the decree (R. 63). The final decree to this effect was entered on January 15, 1937 (R. 63).

Thereafter, upon the petition of the respondents and the petitioners, a rehearing was granted (R. 63).

On June 1, 1937, the Circuit Court of Appeals rendered an opinion to the effect that the respondents were entitled to a lien upon the proceeds of the Kingdom of Denmark bonds, originally segregated in the Trust Department of the Ticonic National Bank but later taken over by the Peoples National Bank and sold by the Receiver of the Peoples-Ticonic National Bank, for the amount of principal due and also for interest from the date of filing of the bill; namely, July 30, 1935 (R. 57). A final decree was entered confirming the original decree of the lower court with costs (R. 64).

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the First Circuit erred:

1. In holding and deciding that the claimants were entitled to a lien upon the Kingdom of Denmark bonds or the proceeds thereof held by the Receiver of the Peoples-Ticonic National Bank;

2. In holding and deciding that the claimants were entitled to be paid interest out of the proceeds of said

securities for a period subsequent to March 4, 1933, the date of insolvency of the Peoples-Ticonic National Bank;

3. In holding and deciding that the claimants were entitled to be paid interest out of the proceeds of said securities for a period subsequent to the date of insolvency of the Ticonic National Bank;

4. In holding and deciding that execution should issue.

Statutes Involved.

Excerpts from Sec. 192, Title 12, U. S. C. (Revised Statutes, Sec. 5234):

> "Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.
>
> "PROVIDED, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: * * *"

Title 12, U. S. C., Sec. 194 (Revised Statutes, Sec. 5236):

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of

the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Excerpts from Section 248 (k), Title 12, U. S. Code (Sec. 11 (k) of the Federal Reserve Act):

"Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account *and shall not be used by the bank in the conduct of its business* unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System. (Italics ours.)

"In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."

Questions Presented and Reasons for Allowance of Writ of Certiorari.

The Circuit Court of Appeals in affirming the decision of the District Court in this case has decided three important questions, each of which will be discussed under the following sub-headings:

1. If a national bank acting as a fiduciary under the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act) deposits uninvested trust funds in a commercial checking account in another bank, are such funds thereby being used in the conduct of the business of the fiduciary bank and do they thus become entitled to the protection of assets segregated in the Trust Department of the fiduciary bank as security for trust funds held by the bank as fiduciary and being "used by the bank in the conduct of its business" under said statute?

(a) This precise question of Federal law which may affect all national banks having licenses to conduct fiduciary activities has not been, but should be, settled by this court in order that the Comptroller of the Currency in exercising his supervisory duties over national banks may apply with uniformity the correct rules. In the instant case there has been no contention by the respondents that the Peoples-Ticonic National Bank became the trustee of this trust, nor has there been any denial that from August 3, 1931, the funds of this trust estate, of which the Ticonic National Bank was trustee, were carried in a checking account in the Peoples-Ticonic National Bank.

(b) The decision of the Circuit Court of Appeals for the First Circuit established a rule that under the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act), uninvested trust cash deposited by a national bank fiduciary in an account in the Commercial Department of another bank must, nevertheless, be secured by the fiduciary national bank in the same manner as is required if said trust funds were deposited in the Commercial Department of the fiduciary national bank.

It is submitted that, aside from controlling statutes permitting a fiduciary national bank to deposit uninvested trust funds in its *own* Commercial Department, it is under the same duty to avoid self-dealing by using trust funds in the conduct of its own business as applies to individual fiduciaries. The deposit of trust funds in a bank's own Commercial Department is self-dealing, and unless permitted by statutory provisions is subject to criticism as submitting the respective estates to the hazards of the conflicting interests of the fiduciary bank. See Bogart on Trusts and Trustees, Vol. 3, pages 1897 and 1901. In some states, fiduciary state banks are not permitted to deposit trust funds in their

own Commercial Departments. *First National Bank of Opp* v. *Weaver,* 142 So. 420; Bogart on Trusts and Trustees, Vol. 3, page 1901. It is believed that fiduciary banks are in no sense precluded from exercising the degree of care in avoidance of self-dealing exacted of individual fiduciaries, and therefore said fiduciary banks have the right to deposit their uninvested trust funds in some other bank so long as due care in the choice of the depositary is exercised. *Strauss* v. *United States Fidelity and Guaranty Company,* 63 F. (2d) 174.

If a national bank fiduciary does deposit its uninvested trust funds in another bank and accounts to the interested trust estates for any interest which the other bank may allow on the trust account maintained in that bank, it is no more using the funds in its own business than would be any other individual fiduciary who deposited the funds in the bank. It is that other bank that has the use of the funds and not the fiduciary bank. Although statutory provisions in various States and/or decisions of the courts have recognized that it is really too much to expect a bank to abandon its own facilities for handling funds and to deposit the uninvested trust funds in some other institution or else hoard the actual cash in its vaults, nevertheless, said fiduciary banks, in the absence of statutes providing otherwise, certainly are permitted to exercise either one of the alternatives. See *First National Bank of Opp* v. *Weaver, supra;* also, *Robinson* v. *Williams,* 159 So. 239. In the latter case, on page 241, the court said:

> "When a bank is named executor or guardian under a statute which authorizes it to act as such, there is, we think, an implied authority to make a deposit of the money so held in itself and there retained in the usual and customary manner *to the same extent that the bank as such guardian or executor could lawfully make the deposit in another bank, and could lawfully retain it there.*" (Italics ours.)

It is submitted that the provisions of Section 248 (k), Title 12, U. S. Code (Section 11 (k) of the Federal Reserve Act), merely permit a fiduciary national bank to engage in self-dealing with respect to uninvested trust funds by depositing same in its own Commercial Department, provided, however, that assets are segregated in the Trust Department to secure the debt thus created and due from the Commercial Department to the trust estates. No provision of the Act, however, precludes the national bank fiduciary from exercising the ordinary care of an individual fiduciary by depositing the uninvested trust funds in *some other* carefully chosen depositary, nor is any provision of the Act susceptible of the interpretation that uninvested trust funds deposited by the fiduciary national bank in some other bank must be secured by assets segregated in the Trust Department of the fiduciary bank.

If, therefore, the Ticonic National Bank as fiduciary in the instant case could have deposited the uninvested funds of the Sprague trust in another bank without being required to secure same by segregating assets in its own Trust Department, then it logically follows that it could properly, at any time, transfer trust funds on deposit in its own Commercial Department to another bank to be carried by that other bank in an account in favor of the Ticonic National Bank, Trustee, and, having thus transferred the funds, they would, of course, cease to be secured. The transaction between the Ticonic National Bank and the Peoples National Bank resulted in the balance due the Sprague estate being placed on deposit in the Peoples-Ticonic National Bank, and, therefore, coincidental with the transfer of the account to the Peoples National Bank (which later became the Peoples-Ticonic National Bank), the lien against the Kingdom of Denmark bonds was automatically released.

2. *Is a secured creditor entitled to interest for any period subsequent to the date of insolvency of a national bank when it appears that the proceeds of the pledged assets are sufficient to pay the principal and said interest but where the assets of the bank are insufficient to pay all creditors' claims in full plus interest, and is an order of court to pay such interest in conflict with the provisions of Section 194, Title 12, U. S. Code, relating to ratable distribution of the assets of national banks in receivership?*

(a) This precise question of Federal law frequently arising in the administration of the affairs of insolvent national banks has not been, but should be settled by this court in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks may apply with uniformity the correct rules concerning such cases.

(b) The decision of the Circuit Court of Appeals for the First Circuit established a rule in the instant case that the lien claimant is entitled to interest on the principal due as of the date the bill of complaint is filed out of the proceeds of the security for the period from the date when the bill of complaint is filed up to the date of payment of the principal. This rule differs from and conflicts with the rules established by this Honorable Court, other Circuit Courts of Appeal and Lower Courts in cases dealing with secured creditors of insolvent national banks.

The status of secured creditors has been considered by this Honorable Court in the cases of *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, and *Aldrich* v. *Chemical National Bank,* 176 U. S. 618. In the case of *Merrill* v. *National Bank of Jacksonville, supra,* this Honorable Court stated the rule as to the rights of the secured creditor, page 147, as follows:

"Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of

insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

The above rule was reiterated in the opinion of this Honorable Court in the case *Aldrich* v. *Chemical National Bank, supra,* at page 638.

Attention is invited to the fact that in both of the last-mentioned cases the lower courts had awarded interest upon dividends paid to creditors of insolvent national banks from the dates of the declaration thereof to the dates of payment to the claimants, and these lower court decisions were affirmed by this Honorable Court. But if the claimants were entitled to obtain interest on the principal of the debts up to the dates of payment either out of collateral or general dividends or both, and these sources were adequate for that purpose, the allowance of interest upon the dividends would result in a duplication of interest. Thus the inference can be drawn from said decisions that interest on the principal for any period subsequent to insolvency is not allowable unless the assets of the bank are sufficient to pay all creditors in full.

The following Circuit Courts of Appeal have adopted rules regarding the rights of secured creditors of insolvent national banks at variance with the decision of the Circuit Court of Appeals for the First Circuit in the instant case:

THIRD CIRCUIT: *Richman* v. *First Methodist Episcopal Church of Collingswood*, 76 F. (2d) 344, certiorari denied under caption *Long* v. *First Methodist Episcopal Church*, 296 U. S. 593.

In that case the court decided that a certain balance due the claimants had the status of uninvested trust funds deposited by the national bank fiduciary in its own Commercial Department and secured under the provisions of 11 (k) of the Federal Reserve Act, 248 (k), Title 12, U. S. Code. Nevertheless, the Circuit Court said, page 346:

> "Interest is not allowable, as a general rule, after property of an insolvent is in custodia legis. Ohio Savings Bank and Trust Co. v. Willys Corp., (C.C.A.) 8 F. (2d) 463, 44 A. L. R. 1162. This has been specifically ruled as to national banks. White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603. • • •
>
> "In our opinion it was error to allow interest after March 24, 1933, the date of the appointment of the conservator."

FOURTH CIRCUIT: *Gamble* v. *Wimberly*, 44 F. (2d) 329.

In that case the court drew a parallel between the status of a secured creditor of an insolvent national bank and a secured creditor of a bankrupt in so far as interest subsequent to the date of insolvency was concerned and the Court applied the rules laid down by this Honorable Court in the case of *Sexton* v. *Dreyfus*, 219 U. S. 339. The Circuit Court of Appeals, in *Gamble* v. *Wimberly*, page 333, quoted the opinion of this Honorable Court in the case of *Merrill* v. *National Bank of Jacksonville*, *supra*, as follows:

> "*When secured creditors have received payment in full, their right to dividends and their rights to retain their securities cease,* but collections therefrom are not otherwise material."

And then the Circuit Court of Appeals for the Fourth Circuit comments as follows:

> "So, whether the trustee is entitled to interest depends upon what the Supreme Court intended shall constitute the 'full amount' of the claim. Was this intended to include interest subsequent to the date of the insolvency when, as we have seen from the explicit language of the Supreme Court, the liability in so far as the assets in the hands of the Receiver are concerned is made fixed and absolute? We believe that there is but one conclusion to be adopted from this language, and that is that such interest is not allowed unless and until all creditors have been paid the full amount of their claims with interest to the date of insolvency. If there should then remain a surplus in the hands of the Receiver, he may, and should, distribute the same equally among all creditors to the extent that it will cover interest due them."

The Circuit Court of Appeals for the Fourth Circuit then decided that the secured creditor of the insolvent national bank involved was not entitled to interest subsequent to the date of insolvency, either out of the proceeds of his collateral or general dividends, except that he could apply against interest accruing subsequent to the date of insolvency any interest or dividends accrued and collected upon the collateral itself subsequent to the date of insolvency of the bank.

NINTH CIRCUIT: *Douglass* v. *Thurston County*, 86 F. (2d) 899.

In that case the Circuit Court arrived at the conclusion that the secured claimants were not entitled to interest from any source for a period subsequent to the date of insolvency unless and until all creditors were paid in full. In support of this proposition on page 910, the Court referred to *Chemical National Bank* v. *Armstrong*, 59 Fed. 372; *Peoples National Bank* v. *Payne*,

26 F. (2d) 208; *Gamble* v. *Wimberly*, 44 F. (2d) 329; *Kershaw* v. *Jenkins*, 71 F. (2d) 647; *Richman* v. *First Methodist Episcopal Church*, 76 F. (2d) 344, certiorari denied under caption *Long* v. *First Methodist Episcopal Church*, 296 U. S. 593. It will be observed that this decision conflicts with an earlier decision of this same Circuit Court of Appeals in the case of *First National Bank of Forsyth* v. *Fidelity and Deposit Co. of Maryland*, 48 F. (2d) 585, where the claimant asserted and was allowed in part a preferred claim against the insolvent national bank there involved. The Circuit Court in that case allowed interest at the legal rate from the date of the decree of the lower court.

TENTH CIRCUIT: *Fash* v. *First National Bank of Alva, Okla.*, 89 F. (2d) 110.

In that case the Circuit Court of Appeals decreed that a secured creditor was not entitled to interest for any period subsequent to the date of insolvency of the national bank, the Court saying at page 112:

> "It is well settled that interest accruing on a claim after insolvency cannot be paid unless the assets are sufficient to pay all claims in full, because to pay interest on one while others are unpaid in whole or in part would violate the exaction of ratable distribution of assets. White v. Knox, supra; Kershaw v. Jenkins, supra; Anderson v. Missouri State Life Ins. Co. (C.C.A.) 69 F. (2d) 794; Richman v. First Methodist Episcopal Church (C.C.A.) 76 F. (2d) 344; Pinckney v. Wylie (C.C.A.) 86 F. (2d) 541; American National Bank v. Williams (C.C.A.) 101 F. 943. And that rule applies to a claim for a deposit secured by pledged collateral. Interest cannot be paid on such a claim whether it be public money deposited pursuant to the provisions of law, Douglass v. Thurston County (C.C.A.) 86 F. (2d) 899; In re American Bank & Trust Co. of Ardmore, 176 Okla. 202, 55 P. (2d) 470; or money of an individual deposited volun-

tarily, Gamble v. Wimberly (C.C.A.) 44 F. (2d) 329."

Cases have been decided by State Courts where the trust estates were protected by securities owned by national banks and deposited with the State authorities under Section 11 (k) of the Federal Reserve Act, Section 248 (k), Title 12, U. S. Code, and in certain of such cases surcharges have been awarded against the national bank fiduciaries with a disallowance of interest for any period subsequent to the date of insolvency. One such case is *In re Lemp,* 283 N. Y. S. 766, where security was on deposit with the Superintendent of Banks of the State of New York. The Appellate Division of the Supreme Court of the State of New York said, page 768:

> "In such cases the law requires ratable distribution (Title 12, U. S. C. A. 194). No interest is allowed on any claim against an insolvent national bank until after the principal of all claims, with interest to the date of insolvency, has been paid in full. White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; Hallett v. Fish, (C.C.) 123 Fed. 201. If a surplus then remains, the receiver may make ratable distribution of accrued interest. Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 S. Ct. 360, 43 L. Ed. 640; Gamble v. Wimberly (C.C.A.) 44 F. (2d) 329. The effect of allowing interest on the petitioner's claim for the period subsequent to March 3, 1933, is to accord her a preference as against other creditors to whom interest will not be allowed."

In establishing rules respecting the rights of secured creditors to interest accruing subsequent to insolvency, the several Circuit Courts of Appeal have relied in part upon decisions of this Honorable Court and upon the decisions of other Circuit Courts of Appeal in cases dealing with unsecured and so-called preferred creditors. For this reason a brief reference to those cases seems pertinent.

(1) Cases Involving Unsecured Creditors.

In the cases of *White* v. *Knox,* 111 U. S. 784, 787, and *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, this Honorable Court determined that an unsecured creditor of an insolvent national bank is not entitled to interest for any period subsequent to the date of insolvency unless and until all creditors have been paid the principal amounts of their claims in full and in the latter event all creditors are equally entitled to interest to the extent that the assets are adequate for that purpose.

The rule established by this Honorable Court in the above cases has been followed by Circuit Courts of Appeal and District Courts as illustrated by the following cases:

Peoples National Bank v. *Payne,* 26 F. (2d), 208, 209 (C. C. A. 8); *Kershaw* v. *Jenkins,* 71 F. (2d) 647, 650 (C. C. A. 10); District Courts: *Hallett* v. *Fish,* 123 Fed. 201, 203; *Dunnagan* v. *Best,* 59 F. (2d) 795, 796.

(2) Cases Involving Preferred Claims.

In cases where claimants have been allowed, so-called, preferred claims, the Circuit Courts of Appeal and District Courts have almost uniformly declined to allow interest on the amounts due for any period subsequent to the date of insolvency as shown by the following cases: *Richardson* v. *Louisville Banking Co.,* 94 Fed. 442, 449 (C. C. A. 5); *Butler* v. *Western German Bank,* 159 Fed. 116, 117 (C. C. A. 5); *Anderson* v. *Missouri State Life Ins. Co.,* 69 F. (2d) 794, 799 (C. C. A. 6); *Peoples National Bank* v. *Moore,* 25 F. (2d) 599, 601 (C. C. A. 8); *Merchants National Bank of Helena* v. *School District,* 94 Fed. 705, 709 (C. C. A. 9); District Courts: *Clark Sparks & Sons Mule & Horse Co.* v. *Americus National Bank,* 230 Fed. 738, 742; *Smith*

Reduction Corporation v. *Williams,* 15 F. (2d) 874, 875.

The reasons for the disallowance of interest subsequent to the date of insolvency in preferred claim cases are stated in *Richardson* v. *Louisville Banking Co., supra,* on page 449 as follows:

"The decree of the court below allows interest against the receiver from judicial demand. We are of opinion that this was erroneous. The funds collected, coming into the hands of the receiver, turned over to the comptroller, could not earn interest, and any interest to be paid thereon would be necessarily taken from some other trust fund."

It is submitted that the confusion of rules adopted by the several Circuit Courts of Appeal, District Courts, and State Courts respecting the rights of a secured creditor of an insolvent national bank to interest for any period subsequent to the date of insolvency necessitates clarification and final determination by this Honorable Court.

3. *Is a creditor of an insolvent national bank who is allowed a lien on a specific fund in the hands of the receiver of a national bank other than the debtor bank entitled to the issuance of execution in enforcement of said lien?*

(a) This precise question of Federal law has not been but should be settled by this court in order that the Comptroller of the Currency who is charged by law with supervision over the winding up of such banks may apply the correct rules concerning the treatment of claims of this nature.

It should be pointed out that the Kingdom of Denmark bonds involved in this case were owned by the Peoples-Ticonic National Bank and were sold by the Receiver and the proceeds remitted to a properly designated depositary subject to the order of the Comptroller of the Currency, as prescribed by Section 192,

U. S. Code, Revised Statutes 5234. With this in mind, it would appear that the decision of the Circuit Court of Appeals for the First Circuit regarding the issuance of execution is in conflict with the principles established by this Honorable Court in the case of *First National Bank of Bethel* v. *National Pahquioque Bank*, 81 U. S. 383, in which case this court said, pages 401-402:

> "Claims presented by creditors may be proved before the Receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comtroller of the Currency, and be content with a just and legal distribution of proceeds of the assets collected by the receiver and liquidated by the Comptroller according to the Act of Congress in such case made and provided."

A similar position was taken in the case of *Eastern Townships Bank* v. *Vermont National Bank of St. Albans*, 22 Fed. 186, 189, and in the case of *Richardson* v. *Louisville Banking Company*, 94 Fed. 442, 449, where the Circuit Court of Appeals for the Fifth Circuit held that it was error for the lower court to summarily direct the payment of the fund within a brief time limit. The decision of the Circuit Court of Appeals for the First Circuit would appear also to be in conflict with the logic of the cases of *Port Newark National Bank* v. *Waldron*, 46 F. (2d) 296; *Liberty National Bank* v. *McIntosh*, 16 F. (2d) 906, cert. denied 273 U. S. 783; *Steele* v. *Randall*, 19 F. (2d) 40; *Earle* v. *Pennsylvania*, 178 U. S. 449; *Earle* v. *Conway*, 178 U. S. 456, which

cases limit the powers of both State and Federal Courts to interfere with the ordinary administration of insolvent national banks by the Comptroller of the Currency and protect the Receiver from summary execution and levy. It would appear that the proper rule is that the judgment should have been certified to the Comptroller of the Currency for payment in due course of administration, as indicated by the Circuit Court of Appeals for the Fifth Circuit in the case of *Merrill* v. *First National Bank of Jacksonville*, 75 Fed. 148, at 153, the decision of which court was affirmed by this Honorable Court in 173 U. S. 131.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities show that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rules of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1947

No. 374

TACOMA NATIONAL BANK,
PEOPLES TACOMA NATIONAL BANK, and
ARTHUR G. PEDERS, as Executor of Estate of Frank Peders,
Petitioners,

v.

LOUIS E. SCHAUER and MARGARET DAVIS SCHAUER,
Respondents.

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 374.

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER, as Receiver of Both Said Banks,
Petitioners,

v.

LOTTIE F. SPRAGUE and MARGARET DAVIS SPRAGUE,
Respondents.

BRIEF FOR PETITIONERS.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the District of Maine appears on Pages 44 to 48 of the record and is reported in 14 F. Supp. 900. The per curiam opinion of the United States Circuit Court of Appeals for the First Circuit affirming the original decree of the District Court but striking out the allowance of interest subsequent to the date of suspension appears on page 57 of the record and is reported in 87 F. (2) 365. The opinion of June 1, 1937,

of the Circuit Court of Appeals upon rehearing appears on pages 52 to 57 of the record and is reported in 90 F. (2) 641.

JURISDICTION.

The decree of the Circuit Court of Appeals to be reviewed was entered on June 1, 1937, (R. 59). Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Title 28, U. S. C. 347). Petition for writ of certiorari was filed on September 1, 1937, and the order allowing the writ of certiorari limited to the question as to the allowance of interest was filed the 18th day of October, 1937. (R. 59).

STATEMENT OF THE CASE.

On July 29, 1935, the respondents, as plaintiffs, filed in the District Court of the United States for the District of Maine, their bill of complaint against the Ticonic National Bank, the Peoples-Ticonic National Bank and Arthur G. Picher, as receiver of both banks. (R. 1). The bill alleges in substance that plaintiffs delivered to the Ticonic National Bank on March 28, 1931, the amount of $5,022.18 under a certain trust agreement. Under the bill the plaintiffs sought to establish a lien on certain securities which had originally been segregated from its other assets by the Ticonic National Bank and held in its trust department to secure the aforesaid fund and other trust funds which the bank received in its trust department and deposited in its own commercial department under the provisions of Section 11(k) of the Federal Reserve Act, (Title 12, U. S. C., 248 (k), Appendix, pp. 25-26). Included among the bonds thus segregated was a certain lot of $20,000 Kingdom of Denmark bonds. (R. 44).

The indenture of trust between Lottie F. Sprague and the Ticonic National Bank empowered the bank to invest and reinvest the fund, but prescribed that as to $1,000.00

thereof, the trustee was authorized and empowered to deposit same in its savings department at its usual and existing rates of interest. (R. 8).

Previous to August 3, 1931, there were two national banks in Waterville, Maine—the Ticonic National Bank and the Peoples National Bank. On that date the Ticonic National Bank sold practically all of its assets to the Peoples National Bank under the provisions of a contract by which the Peoples National Bank undertook and agreed to pay the deposit liabilities of the Ticonic National Bank in full. (R. 36). The Peoples National Bank then changed its name to the Peoples-Ticonic National Bank. The Ticonic National Bank then went into voluntary liquidation under Section 5220 R. S., (Title 12, U. S. C., Sec. 181). (R. 44).

Included in the deposit liabilities assumed by the Peoples National Bank was an account reflecting a balance of $10,127.66. This was the account in which the Ticonic National Bank as fiduciary had carried its trust funds deposited in its commercial department under the permissive provisions of Section 11(k) of the Federal Reserve Act, (Title 12, U. S. C., 248(k)). Included in the total due the several trust estates was an item of $4,882.18, which represented the balance then due on the Lottie F. Sprague trust. Under the provisions of the contract between the two banks the above-mentioned Kingdom of Denmark bonds were sold to the Peoples National Bank. These bonds were then treated by the new bank as its own property and segregated from its other assets to secure its own trust funds deposited by it in its own commercial department. (R. 45).

On March 4, 1933, the Peoples-Ticonic National Bank suspended business and never again reopened. For a while its affairs were administered by a conservator and on November 6, 1933, your petitioner, Arthur G. Picher, was appointed receiver. (R. 3). On March 4, 1933, the date of suspension of the Peoples-Ticonic National Bank, the checking account in the commercial department of that bank,

in which the funds of the Sprague trust as well as of other trust estates of which the Ticonic National Bank was trustee were carried, reflected a balance of $12,462.21 (R. 43) and the amount due on the Lottie F. Sprague trust was $4,099.83. (R. 43). This amount was later reduced by payments made by the Conservator of the Peoples-Ticonic National Bank to $3,649.65, (R. 45), which was the amount due when plaintiffs' bill of complaint was filed.

Between the dates of August 3, 1931, and June 28, 1934, the Ticonic National Bank was in voluntary liquidation. On the latter date your petitioner, Arthur G. Picher, was appointed receiver of that bank also. (R. 3). The Kingdom of Denmark bonds were subsequently sold by the Receiver of the Peoples-Ticonic National Bank for the amount of $20,722.66. (R. 17).

The District Court rendered an opinion on May 29, 1936, (R. 44), holding that respondents were entitled to payment in full of the sum of $3,649.65 with interest from the date the bill was filed and with costs. On June 6, 1936, a final decree was entered by the District Court sustaining the plaintiffs' bill and ordering the defendant, as Receiver of the Peoples-Ticonic National Bank, to pay the plaintiffs the sum of $3,649.65 with interest from July 30, 1935. (R. 48).

Your petitioner appealed to the United States Circuit Court of Appeals for the First Circuit, which court in a per curiam dated January 15, 1937, modified the decree of the District Court by striking out the words, "with interest from July 30, 1935" and as so modified, affirmed the decree of the District Court and entered its final decree to this effect on the same day. (R. 57 & 58).

Thereafter, upon the petition of the respondents and of the petitioner, a rehearing was granted. (R. 58.) On June 1, 1937, the Circuit Court of Appeals rendered an opinion to the effect that respondents were entitled to a lien on the proceeds of the Kingdom of Denmark bonds (which bonds had originally been segregated in the trust department of

the Ticonic National Bank but were later taken over by the Peoples National Bank and sold by the Receiver of the Peoples-Ticonic National Bank) for the amount found due by the District Court. (R. 52.) On the same day the Circuit Court of Appeals entered an order vacating the final decree entered by it on January 15, 1937, and entered a final decree affirming the decree of the District Court, with costs. (R. 58 & 59.)

SPECIFICATION OF ERRORS AS TO WHICH CERTIORARI WAS GRANTED.

It is submitted that the Circuit Court of Appeals for the First Circuit erred:

(1) In holding and deciding that the claimants are entitled to be paid interest out of the proceeds of the Kingdom of Denmark bonds subsequent to March 4, 1933, the date of suspension of the People's Ticonic National Bank;

(2) In holding and deciding that the claimants are entitled to be paid interest out of the proceeds of said securities for a period subsequent to the date of insolvency of the Ticonic National Bank; namely, June 28, 1934.

QUESTIONS PRESENTED.

Is a secured creditor entitled to interest for any period subsequent to the date of suspension of a national bank when it appears that the proceeds of the assets upon which he has a lien are sufficient to pay the principal and said interest but where all of the assets of the bank are insufficient to pay all creditors' claims as of the date of suspension in full?

Is an order of court to pay such interest in conflict with the provisions of Title 12, U. S. C., 194, relating to ratable distribution of the assets of national banks in receivership?

SUMMARY OF ARGUMENT.

The National Bank Act constitutes a complete code for the establishment, operation and winding-up of national banking associations and must be construed uniformly throughout the United States. The provisions of the National Bank Act relating to ratable distribution of the assets of national banks in receivership, as construed by the Courts, require the stoppage of interest on all claims of creditors as of the date of suspension unless and until the amounts of all claims as of that date have been paid in full, whereupon all creditors are alike entitled to share in further ratable distributions to be applied on interest from the date of suspension.

This rule is applicable alike to unsecured and secured creditors. It is applicable even though the claim of a secured creditor is based upon a contract which contains a stipulation for the payment of interest. It is certainly applicable where the contract contains no provision for the payment of interest because in that case if interest were allowed it would be in the nature of damages for a wrongful detention of the fund. This detention, however, is a necessary incident to the operation of the law controlling the liquidation of insolvent national banks and affects all creditors alike. Therefore, the claimants in the instant case are not entitled to interest for any period subsequent to the date of suspension of the Peoples-Ticonic National Bank unless it subsequently developes that sufficient funds are realized from liquidation to pay ratably all creditors interest.

ARGUMENT.

It is recognized at the outset that under ordinary circumstances the holder of a contractual obligation drawing interest is entitled to that interest up to the date of payment as against a solvent debtor and in cases where the solvent debtor has wrongfully withheld the payment of funds, even where there is no specific contract for interest, courts ordinarily will award interest as a measure of damages.

With respect to an insolvent debtor, however, a different rule is necessarily invoked. Since insolvency connotes the inability of the debtor to pay his debts in full as of the date of insolvency, there would be no merit in recognizing the continuing of interest after the date of insolvency or assignment of assets for the benefit of creditors for the purpose of determining the pro rata share of each creditor in the assets of the insolvent debtor. Hence, for the purpose of computing dividends, the general rule is that the amounts due as of the date of insolvency or the assignment of assets for the benefit of all creditors will be used. *Thomas* v. *Western Car Co.*, 149 U. S. 95, 116, 117, 37 L. Ed. 663, 671; *White* v. *Knox*, 111 U. S. 784, 786, 788, 28 L. Ed. 603, 604. It is of course recognized that as against the debtor the claims do not lose their interest-bearing quality and in the event the assets prove sufficient for that purpose interest accruing subsequent to the date of insolvency must be paid. *National Bank of New York* v. *Mechanics National Bank*, 94 U. S. 437, 24 L. Ed. 176; *Richmond* v. *Irons*, 121 U. S. 27, 64, 30 L. Ed. 864, 876; *American Iron & S. Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266, 267, 58 L. Ed. 949, 953, 954.

It is also recognized that in certain cases not involving national banks many courts have allowed interest accrued subsequent to the date of insolvency or the date of the filing of a petition in bankruptcy to be collected by a secured creditor out of his collateral. See *Central Trust Co.* v. *Condon*, 67 Fed. 84; *Coder* v. *Arts*, 213 U. S. 223, 53 L. Ed. 772; *Detroit Trust Co.* v. *State Bank*, 114 N. W. 327; *Hanover National Bank* v. *Brown*, 53 S. W. 206; *Harlan* v. *Houston*, 258 Fed. 611; *San Antonio Loan & Trust Co.* v. *Booth*, 2 F. (2) 590; *State* v. *Chelan Co.*, 54 P. (2) 1006 and *In re Stevens*, 173 Fed. 842.

The above cases are not controlling as to national banks, for national banks, being instrumentalities of the federal government, must be organized, operated and liquidated in compliance with the applicable federal statutes. As was

said in the case of *Cook County National Bank* v. *United States,* 107 U. S. 445, 448; 27 L. Ed. 537, 538:

> "We consider that Act (National Bank Act) as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; * * * and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, * * *." (Insert ours.)

Where Congress has seen fit to make statutory provisions embracing an entire subject, dealing with it in all its phases, such as the provisions for the organization, operation and liquidation of national banks, that subject is virtually withdrawn from the operation of a general law as effectively as though, as to such subject, the general law were in terms repealed. *Cook County National Bank* v. *United States, supra.*

The federal statutes authorizing the Comptroller of the Currency to appoint receivers for insolvent national banks and prescribing his duties with respect to the distribution of the assets of said insolvent national banks are found in Sections 192 and 194 of Title 12, U. S. C. (R. S. 5234 & 5236). In the latter section it is prescribed that the Comptroller, after making provision for refunding to the United States any deficiency in redeeming the circulating notes of such association,

> "* * * shall make a ratable dividend of the money so paid over to him by such receiver on *all* such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, * * *." (Italics ours)

The mandatory provision of this statute was considered by this Honorable Court in the case of *White* v. *Knox,* 111 U. S. 784, 28 L. Ed. 603. This case involved a mandamus action to compel the Comptroller of the Currency to pay a dividend

to a creditor of an insolvent national bank on the basis of the amount of a judgment rendered against the bank several years after the date of insolvency. The lower court, in awarding the judgment, had included interest on the amount of the debt as of the date of insolvency up to the date of the entry of the judgment but the Comptroller allowed the claim on a figure representing the amount due as of the date of insolvency, thus eliminating the interest for the period subsequent to insolvency. The action of the Comptroller was supported by this Honorable Court, which said inter alia, at page 787:

> "The business of the bank must stop when insolvency is declared. R. S. Sec. 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin *in something done before the insolvency.* It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all; otherwise the distribution would be according to different rules and not ratably, as the law requires." (Italics ours)

The rule announced in *White* v. *Knox, supra,* to the effect that the only claims which are entitled to recognition by a receiver of an insolvent national bank are those which had accrued and become unconditionally fixed on or before the suspension of the bank, has been recognized and followed by numerous decisions of this Honorable Court, United States Circuit Courts of Appeals and United States District Courts, as illustrated by the following cases: *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, 33 L. Ed. 747, 760, 761; *Dakin* v. *Bayly,* 290 U. S. 143, 78 L. Ed. 229; *Scott* v. *Armstrong,* 146 U. S. 499, 36 L. Ed. 1059; *Peoples National Bank* v. *Payne,* 26 F. (2d) 208; *Hallett* v. *Fish,* 123 Fed. 201; *Kershaw* v. *Jenkins,* 71 F. (2) 647;

American National Bank v. *Williams,* 101 Fed. 943; *Citizens Bank & Trust Co.* v. *Thornton et al.,* 174 Fed. 752; *American Surety Co.* v. *De Carle,* 25 F. (2) 18; *Steele* v. *Randall,* 19 F. (2) 40 and *Dunnagan* v. *Best,* 59 F. (2) 795, 796.

The status of secured creditors of insolvent national banks was considered by this Honorable Court in the case of *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 43 L. Ed. 640, and *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, 44 L. Ed. 611. In the case of *Merrill* v. *National Bank of Jacksonville, supra,* at page 146, this Court stated the rule as follows:

> "We repeat that it appears to us that the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have."

And again, at page 147:

> "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities, cease, but collections therefrom are not otherwise material."

Attention is invited to the fact that in that case and in the case of *Aldrich* v. *Chemical National Bank, supra,* the lower courts had awarded interest upon the dividends due the secured creditors from the dates of the declaration of those dividends to the dates on which they were paid to the claimants and the lower court decisions were affirmed by this Honorable Court. But if the claimants were entitled to obtain interest on the principal of the debts up to the dates of payment either out of collateral or general dividends or both,

and these sources were adequate for that purpose, the allowance of interest upon the dividends which were based on the total of principal and interest due as of the date of insolvency would result in a duplication of interest. Thus, the inference can be drawn from said decisions that interest on the principal for any period subsequent to the date of insolveency is not allowable. In fact, this inference apparently was drawn in the case of *Merrill* v. *National Bank of Jacksonville, supra,* by Mr. Justice White in his dissenting opinion, concurred in by Mr. Justice Harlan and Mr. Justice McKenna, wherein he said, at page 172:

> "It seems to me it has been shown by the doctrine announced by Lord Hardwicke in 1743 (Browmley v. Goodere, supra), that the stoppage of interest on the claims of *all* creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court." (Italics ours)

In several recent decisions Circuit Courts of Appeals have construed the decided cases as establishing the rule that interest on secured claims against an insolvent national bank stops as of the date of suspension. In the case of *Gamble* v. *Wimberly,* 44 F. (2d) 329, decided in 1930, by the Circuit Court of Appeals for the Fourth Circuit, the lower court had allowed a secured creditor to apply collections from collateral security to interest accruing subsequent to the date of suspension of an insolvent national bank in Wilmington, North Carolina, but the Circuit Court of Appeals reversed the lower court, holding that the secured creditor of an insolvent national bank was not entitled to interest accruing subsequent to the date of suspension either out of the proceeds of his collateral or general dividends except that he could apply against said interest accruing subsequent to the date of suspension any interest or dividends accrued and collected upon the collateral itself for the period subsequent to the date of insolvency.

This latter provision, allowing the secured creditor to apply the income from the collateral security accrued subsequent to the date of suspension against interest on the debt for the period subsequent to the date of suspension, was derived from the case of *Sexton* v. *Dreyfus,* 219 U. S. 339, 55 L. Ed. 244, decided by this Honorable Court in 1911. That case, however, involved a secured creditor of a bankrupt estate. It is submitted that there is no logical reason for the application of this rule in bankruptcy to cases involving secured creditors of an insolvent national bank. A secured creditor of a bankrupt estate who wishes to file a claim and participate in general dividends is required to sell his collateral or have it appraised as of the date the petition in bankruptcy was filed, and in the event that the value of the collateral is inadequate to pay the secured creditor in full, he is allowed a claim only for the difference between the proceeds or appraised value of the collateral and the amount due as of the date the petition was filed. Obviously, therefore, such a secured creditor is in the position of becoming virtually the real owner of the securities from the date the petition is filed and it would be illogical and inequitable to require such a creditor to apply the income on those securities for any period subsequent to the date of the filing of the petition to any portion of the claim computed as of the date of filing of said petition. This justification for this phase of the rule in bankruptcy is entirely absent in the case of a secured creditor of an insolvent national bank since a secured creditor against an insolvent national bank is permitted to file his claim for the full amount of the principal and interest due as of the date of insolvency without any application of the proceeds of his collateral or the appraised value thereof and is entitled to ratable dividends on this claim in addition to the proceeds of his collateral, subject only to the limitation that from both sources he cannot obtain any more than the full amount of the debt.

In discussing the case of *Merrill* v. *National Bank of Jacksonville, supra,* the Circuit Court of Appeals in the case

of *Gamble* v. *Wimberly, supra,* arrived at the conclusion that the clear inference to be drawn from that case was that interest for any period subsequent to the date of suspension was not allowable as to secured or unsecured creditors unless and until the principal of the claims of all creditors against the bank as of the date of suspension was paid in full.

Subsequent to the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Gamble* v. *Wimberly, supra,* the following Circuit Courts of Appeals have applied the rule as laid down in *White* v. *Knox, supra,* respecting interest, to cases of secured creditors: *Richman* v. *First M. E. Church of Collingswood,* 76 F. (2) 344, 346 (C. C. A. 3); certiorari denied 296 U. S. 593; *Douglass* v. *Thurston County,* 86 F. (2) 899, 909, 910 (C. C. A. 9); *Fash* v. *First National Bank of Alva,* 89 F. (2) 110, 112 (C. C. A. 10). State courts have likewise applied this rule to secured creditors of insolvent national banks as illustrated by the case of *In re Lemp,* 283 N. Y. Supp. 766, 768.

In the case of *Douglass* v. *Thurston County, supra,* decided in 1936, the treasurer of the county had deposited approximately $60,000 in the insolvent national bank there involved. The funds of the county were secured by certain surety bonds and by collateral pledged by the bank. This collateral was subsequently sold by a Special Master and produced a total in excess of $62,000, thus being adequate to cover principal and some interest. The county asserted a right to recover interest for the period subsequent to the date of suspension, as called for by the contract executed by the bank, and relied upon the previous decision of that same United States Circuit Court of Appeals in the case of *Washington-Alaska Bank* v. *Dexter Horton National Bank,* 263 Fed. 304. The court, however, pointed out that the case relied upon involved an insolvent state bank and the national banking laws dealing with the question of interest after insolvency were, therefore, not involved. The court decided that a secured creditor of an insolvent national bank was

not entitled to interest from any source for any period subsequent to the date of suspension. The court referred to the cases of *Merrill* v. *National Bank of Jacksonville, supra; Chemical National Bank* v. *Armstrong,* 59 Fed. 372; *White* v. *Knox, supra,* etc. and stated on page 909:

> "Whatever may be the state law on the subject, however, it is clear that it is definitely contrary to the federal public policy to permit national banks to contract for interest on deposits held by such banks after insolvency."

It is interesting to note that the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Douglass* v. *Thurston County* case overruled in principle that part of a previous decision of that same court relating to interest namely the case of *First National Bank of Forsyth* v. *Fidelity & Deposit Co. of Maryland,* 48 F. (2d) 585, where the claimant asserted a preferred claim against an insolvent national bank. The court had in that case allowed in part a preferred claim and awarded interest at the legal rate thereon from the date of the decree of the lower court.

In the case of *Fash* v. *First National Bank of Alva, Oklahoma,* 89 F. (2d) 110, decided by the Circuit Court of Appeals for the Tenth Circuit in 1937, the Court decreed that a secured creditor of the insolvent national bank there involved was not entitled to interest for any period subsequent to the date of suspension. The secured deposit balance in that case was approximately $6,200 and the security held by the creditor sold for approximately $8,600. Therefore the collateral was adequate to pay both principal and interest. Nevertheless, in disallowing interest subsequent to suspension, the court said on page 112:

> "It is well settled that interest accruing on a claim after insolvency cannot be paid unless the assets are sufficient to pay all claims in full, because to pay interest on one while others are unpaid in whole or in part would violate the exaction of ratable distribution of assets. White v. Knox, supra; Kershaw v. Jenkins,

supra; Andersen v. Mo. State Life Ins. Co., (C. C. A.) 69 Fed. (2d) 794; Richman v. First Methodist Episcopal Church (C. C. A.) 76 Fed. (2d) 344; Pinckney v. Wylie (C. C. A.), 86 Fed. (2d) 541; American Nat. Bank v. Williams (C. C. A.), 101 Fed. 943. And that rule applies to a claim for a deposit secured by pledged collateral. Interest cannot be paid on such a claim whether it be public money deposited pursuant to the provisions of law, Douglass v. Thurston County (C. C. A.) 86 Fed. (2d) 899; In re American Bank & Trust Co. of Ardmore, 176 Okla. 202, 55 P. (2d) 470; or money of an individual deposited voluntarily, Gamble v. Wimberly (C. C. A.) 44 Fed. (2d) 329."

It is maintained that all persons contracting with a national bank do so in the light of the statutory provisions for winding up the affairs of said bank in the event of insolvency. As was said in the case of *Citizens Bank & Trust Co.* v. *Thornton*, 174 Fed. 752, decided by the Circuit Court of Appeals for the Fifth Circuit in 1909, at page 763:

> "Every creditor who takes a note with provisions like this is charged with knowledge of the law providing for the administration and settlement of the affairs of an insolvent bank that it enters into his contract, and that it does not contemplate that the creditor who litigates the settlement of his claim with the receiver shall be reimbursed out of the trust funds beyond the statutory costs for his expenses in getting his claim allowed and paid."

In that case the note provided that if it was not paid at maturity the debtors would be liable for all costs of collection, including attorney's fees, but the court determined that since these items of expense were incurred subsequent to the date of suspension they could not be paid either out of dividends or the collateral security.

It is recognized that in some cases involving insolvency proceedings but where national banks were not concerned, courts have considered that where a secured creditor had a contract for the payment of interest, the interest was as much a part of the debt as the principal and have thus al-

lowed the secured creditor to obtain interest for a period subsequent to the date of insolvency. But even in equity receivership proceedings, the rule appears to be that in any event interest cannot be considered a part of the debt and protected by the security where there was no contract for the payment of interest. The rule is stated by Ralph E. Clark (author of "Clark on Receivers") in an article in 19 Mich. L. R. 35, entitled "Interest on Claims in Receivership Proceedings", to the effect that if a debtor has contracted to pay interest, a creditor who has a right to hold or appropriate the security or collateral can hold or appropriate it when default occurs of either principal or interest. If the interest is so secured, then the creditor cannot be compelled to relinquish his right thereto until he has been paid both principal and interest up to the date of payment. However, the author states that if the creditor did not contract for the payment of interest he has no such lien covering interest and he cannot obtain from the proceeds of his collateral a sum greater than his original debt without interest. This was the rule followed in the case of *Tredegar Company* v. *Seaboard Air Line Railway et al.*, 183 Fed. 289, decided by the Circuit Court of Appeals for the Fourth Circuit in 1910, and in the cases of *McCormick* v. *Puritan Coal Mining Co.*, 41 F. (2) 213, decided by the Circuit Court of Appeals for the Third Circuit, and *First National Bank of Chicago* v. *Central Coal & Coke Co.*, 3 F. Supp. 433, decided by the District Court of Wyoming.

In the case of *Tredegar Co.* v. *Seaboard Air Line Railway et al., supra,* the property subject to the lien was ample to pay both principal and interest, but the claim was based upon supplies furnished and there was no contract for the payment of interest. The court in that case recognized that when interest is not stipulated for by the contract or required by statute, it is nevertheless allowed by the courts as against a solvent debtor as damages for the detention of money or of property. However when insolvency intervenes a different rule applies, as the court in that case stated on page 292:

"In other words, when a debtor withholds his money or property from his creditor, he injures his creditor by so depriving him of his due, and damages at a fixed rate, ascertained by law to be the value of the use of money, is awarded him for the period his debtor has deprived him of its use. But this presumes that the debtor has the money or property in his possession and is securing the profit arising from its use. On the other hand, when the debtor becomes insolvent and, at the instance of his creditors, his money and property are taken from him by the law, appealed to by creditors for the purpose of ascertaining their rights and priorities to such money and property, it would seem to be unjust to both debtor and to his unsecured creditors to award to secured creditors interest as damages for the law's delays made necessary in the ascertainment and adjustment of the creditors' rights. * * * It, therefore, seems to us to be entirely equitable that, while the custody of the law continues in such case, such interest in the nature of damages should not be awarded."

Of course, the above rule does not apply either in equity receivership cases or insolvent national bank cases where the assets prove sufficient to pay the full amount of the principal and interest due to all creditors as of the date of insolvency with a surplus over. In such cases, all creditors are entitled to interest before the return of any surplus to the debtors. See *American Iron & Steel Co.* v. *Seaboard Air Line R. Co.*, 233 U. S. 261, 266, 58 L. Ed. 949, 953, 954; *National Bank of N. Y.* v. *Mechanics National Bank*, 94 U. S. 437, 24 L. Ed. 176 and *Richmond* v. *Irons*, 121 U. S. 27, 64, 30 L. Ed. 864, 876.

The provisions of the trust indenture in the instant case did not include any stipulation for interest on any portion of the fund except the sum of $1,000, and, therefore, as to all except said fund of $1,000, there is no contract for interest, express or implied. As to the $1,000 item, the indenture provided that the bank should deposit same in a savings account at the usual rate of interest for such accounts. The bank did not, in fact, deposit this $1,000 in a

savings account and the Circuit Court of Appeals pointed that out in concluding that the contention of the petitioner to the effect that only a debtor-creditor relationship had been established with respect to said $1,000 was untenable. The court, therefore, held that the whole fund was in the same category and all of it was secured. In other words, no contract for the payment of interest came into being and the whole fund can, therefore, be treated as not being subject to a contract for the payment of interest.

The case of *Richman* v. *First Methodist Episcopal Church,* 76 F. (2) 344, decided in 1935 by the Circuit Court of Appeals for the Third Circuit (certiorari denied under caption Long v. First Methodist Episcopal Church, 296 U. S. 593, 80 L. Ed. 420), bears some similarity to the instant case. There the First Methodist Episcopal Church had deposited approximately $62,000 with the trust department of a national bank which subsequently became insolvent. Prior to suspension the amount had been reduced by withdrawals to $30,000. The complainant claimed a lien as security for the $30,000 balance, upon $65,000 of municipal bonds or the proceeds thereof which had been segregated by the bank in its trust department for the purpose of securing the funds. The United States District Court for the District of New Jersey decided that the agreement under which the funds were deposited created a bona fide trust and that the balance due was in fact secured by the bonds or the proceeds thereof which had been thus segregated in the trust department under the requirements of 11(k) of the Federal Reserve Act (Title 12, U. S. C. 248(k)). The lower court also awarded interest subsequent to the date of the suspension of the bank. The Circuit Court of Appeals, however, denied the claimant interest accruing subsequent to the date of the appointment of the conservator on March 24, 1933, despite the fact that the collateral security in this case was adequate to pay both principal and interest.

Another case with some similarity to the instant case is that of *In re Lemp,* 283 N. Y. Supp. 766, decided in 1935.

There the insolvent national bank involved was found guilty of maladministration in the handling of a trust estate and a judgment was awarded against the bank by the Supreme Court of New York. The judgment included interest for a period subsequent to the date of suspension of the bank. The case was appealed to the Appellate Division of the Supreme Court of New York and the appellate court modified the decree of the lower court by eliminating the provision for interest for any period subsequent to the date of suspension. Although the reported opinion does not itself reveal the fact that this was a secured claim, it is a fact that there was on deposit with the Superintendent of Banks of the State of New York under the provisions of 39a of the State Banking Act adequate security to pay the principal and interest due on all claims against that bank based upon maladministration of trust estates. Hence this case is significant for the point that in the absence of a contract for the payment of interest the lien is limited to the amount due as of the date of suspension of a national bank.

There are numerous cases involving so-called preferred claims where there is of course no contract for interest, and where the claimants are virtually asserting that property or funds in the possession of the receiver are in fact owned by the claimants. Where such claims have been allowed, interest has been denied because interest in such a case could be based only upon the theory of damages for the wrongful detention of the funds, and since such detention is the necessary effect of the law, rather than the wrongful act of the bank, the other general creditors of the bank whose equity in all of the assets of the bank vested on the date of insolvency cannot have their rights depleted by the allowance of damages for the detention necessarily inflicted as a result of the process of the law in liquidating the insolvent bank. See *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442 (C. C. A. 5) (1899). Other cases adhering to this principle are as follows: *Bell National Bank of Pineville* v. *Green*, 258 Ky. 317, 79 S. W. (2) 967, 971; *Clark*,

Sparks & Sons Mule & Horse Co. v. *Americus National Bank,* 230 Fed. 738, 742; *Butler* v. *Western German Bank,* 159 Fed. 116, 117, 118; *Smith Reduction Corporation* v. *Williams,* 15 F. (2) 874, 875; *Merchants National Bank of Helena* v. *School District,* 94 Fed. 705, 709; *Peoples National Bank* v. *Moore,* 25 F. (2) 599, 601, 602; *Hallett* v. *Fish,* 123 Fed. 201, 202; *Kershaw* v. *Jenkins,* 71 F. (2) 647, 650; *Peoples National Bank et al.* v. *Payne,* 26 F. (2) 208, 209 and *National Bank of America* v. *U. S. Fidelity & Guaranty Co.,* 71 F. (2) 618, 622 (C. C. A. 7).

We are unaware of any case reported or unreported, aside from the case at bar, where the question of interest subsequent to the date of suspension was in issue in which a secured creditor of an insolvent national bank was specifically allowed interest for any period subsequent to the date of suspension except the case of *Gamble* v. *Wimberly, supra,* in which case the secured creditor was permitted to apply against interest accruing subsequent to suspension any interest or dividends accruing and collected on the collateral security for the period subsequent to suspension. As aforementioned, it is believed that this phase of the decision in Gamble v. Wimberly is untenable. (See page 10, *supra*).

It will be noted that the lower courts in the instant case allowed interest at the legal rate from the date of the filing of the bill of complaint in the United States District Court. It is maintained that there is no logical or legal justification for the choice of that date. There is no need for an exhaustive citation of authority to support the proposition that no judicial demand is essential to mature the obligations of an insolvent national bank; that the law will not compel the various creditors to make the futile gesture of making demand. All liabilities of the bank became due and payable upon the suspension of the bank and all must alike await the orderly distribution of the proceeds of the assets by a receiver appointed by the Comptroller of the Currency. *White* v. *Knox,* 111 U. S. 784, 28 L. Ed. 603. See also *Richardson* v. *Louisville Banking Co., supra,* where the Circuit

Court of Appeals reversed the lower court, which had allowed interest on a so-called preferred claim against an insolvent national bank from the date of judicial demand. If, therefore, interest is to be allowed at all it should be allowed from the date of suspension of the Peoples-Ticonic National Bank; namely, March 4, 1933. It is believed that that is the date upon which the rights of the claimant in this case were fixed rather than the date when a receiver was appointed for the Ticonic National Bank; namely, June 28, 1934, because by the decision of the Circuit Court of Appeals in this case the funds which admittedly were on deposit in the Peoples-Ticonic National Bank were held to be secured by the Kingdom of Denmark bonds under the provisions of Title 12, U. S. C., 248(k). That statute merely provides that a national bank shall not use trust funds in the conduct of its business without first securing same by assets segregated in its trust department. Since the funds were on deposit in the Peoples-Ticonic National Bank the decision of the lower courts is equivalent to a determination that the fiduciary limitations imposed by that statute with respect to the securing of said funds as a condition to their use were imposed upon the Peoples-Ticonic National Bank. Therefore the date of the suspension of the Peoples-Ticonic National Bank, namely, March 4, 1933, is controlling in determining the amount due to the claimants in this case and the extent of the lien against said Kingdom of Denmark bonds and the proceeds thereof.

It is believed that in the absence of any contractual obligation to pay interest on this fund the lien upon said Kingdom of Denmark bonds was and is limited to the amount due as of the date of suspension of said Peoples-Ticonic National Bank and any equity in those assets vested immediately in the receiver of the bank for the benefit of all of the creditors of said bank. In other words, the rights *in personam* of the creditors against the bank were converted into rights *in rem* against all of the assets of the bank taken possession of by the receiver, including the

equity then existing in said Kingdom of Denmark bonds. *Chemical National Bank* v. *Armstrong*, 59 Fed. 372.

The instant case differs in certain significant particulars from the ordinary case in which a secured creditor is the pledgee of specific assets to secure the debt due him alone. The assets segregated in the trust department to secure trust funds remain under the dominion and control of the bank and when a receiver is appointed he has the duty of taking possession of those assets in the same manner as with respect to the other assets of the bank and he has the duty of liquidating those assets and distributing the proceeds to all those trust claimants who establish to the satisfaction of the Comptroller of the Currency or by an adjudication of a court of competent jurisdiction that they are entitled to share pro rata in the proceeds of the assets which were thus segregated in the trust department. See the case of *Way* v. *Camden Safe Deposit & Trust Co.*, decided by the United States District Court for the District of New Jersey, and unreported. (Appendix 27.) It is impossible to ascertain with any degree of certainty all of the obligations of the bank which are entitled to the protection of said segregated assets until the status of the various claims have been determined and opportunity has been given for all those whose claims may be in the same category as other trust claimants to establish them. It is, therefore, particularly necessary that the receiver exercise due precaution in recognizing the validity of claims asserted against said segregated assets and it is his duty to reject doubtful claims pending the determination of the rights of the claimants by a court of competent jurisdiction. Hence in such cases the delays are unavoidable and indeed essential to a proper administration of an insolvent national bank and are caused by the necessity of the law governing the equitable distribution of the proceeds of those segregated assets. It would, therefore, be particularly inequitable to penalize the general creditors of the bank by the awarding of damages in

the form of interest to the trust claimants for any period subsequent to the date of suspension of the bank where those damages must of necessity be paid out of the equities owned by all creditors of the bank, which creditors suffer a like or more extended delay in obtaining their respective pro rata shares in the distribution of said assets. As was said in the case of *Richardson* v. *Louisville Banking Co.*, *supra*, at 449:

> "The funds collected, coming into the hands of the Receiver, turned over to the Comptroller could not earn interest, and any interest to be paid thereon would be necessarily taken from some other trust fund. The involved circumstances surrounding the case made it improper, if not impossible for the Receiver to pay over the amount for which he is charged as trustee, without an investigation and an accounting; and we think he was in no fault, but rather in the fulfillment of his official duties, in refusing to recognize complainant's demands until they were judicially determined. As a general rule in equity, trustees are not required to pay interest unless they are in fault in the management of the trust fund or have so used the trust fund as to earn interest."

Summarizing, it is believed that a proper construction of the applicable portions of the National Bank Act requires that the rights of *all* creditors of an insolvent national bank be fixed as of the date of suspension and that no creditor either secured or unsecured can obtain out of the assets of such bank, including pledged assets or assets subject to a lien, anything more than is due him as of the date of suspension unless and until the amounts due all creditors as of that date are paid in full. It is submitted that as of the date of suspension the rights *in personam* of creditors against the national bank became converted into vested rights *in rem* as against all of the assets of the bank, including the equity then existing in pledged securities or property subject to a lien. Therefore, since in the instant case the lien was limited to the amount due the claimants

as represented by the deposit balance in the Peoples-Ticonic National Bank as of the date of suspension there can be no allowance of interest for any period subsequent to that date without encroaching upon the vested rights of the other creditors in the assets of the bank, including the equity in the Kingdom of Denmark bonds here involved.

It is submitted that even though the claim of a secured creditor is based upon a contract which contains a stipulation for the payment of interest no interest is allowable from any source for any period subsequent to the date of suspension of a national bank but there is an additional and controlling reason for the disallowance of interest in this case for any period subsequent to the date of suspension of the Peoples-Ticonic National Bank in that there was no contract for the payment of interest, and if interest were allowed it would necessarily have to be in the form of damages for the detention of the fund, which detention was the result of the operation of the law and affected alike secured and unsecured creditors. It is believed that the allowance of such damages for detention as to one class of creditors at the expense of other creditors would be a violation of the ratable distribution mandate of the National Bank Act.

CONCLUSION.

It is respectfully submitted that the Decree of the United States Circuit Court of Appeals for the First Circuit should be reversed in so far as it provides for the payment of interest to the claimant subsequent to the date of insolvency of the Peoples-Ticonic National Bank.

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Of Counsel.

APPENDIX.

Statutes Involved.

Excerpts from Title 12, U. S. C., 192 (Revised Statutes, Sec. 5234):

> "Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.
>
> "*Provided,* That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited".

Title 12, U. S. C., 194 (Revised Statutes, Sec. 5236):

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Excerpts from Title 12, U. S. C., 248(k), (Sec. 11(k) of the Federal Reserve Act):

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account

and shall not be used by the bank in the conduct of business unless it shall first set aside in the trust partment United States bonds or other securities proved by the Federal Reserve Board (Board of G ernors of the Federal Reserve System). (Italics inserts ours)

"In the event of the failure of such bank the own of the funds held in trust for investment shall hav lien on the bonds or other securities so set apart addition to their claim against the estate of the ban

Unreported Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

IN EQUITY—E-5485.

On Bill for relief, &c. On Motion to strike bill of complaint.

PALMER M. WAY, et als., Trustees of "GG" Mortgage Pool,
Plaintiffs,

vs.

CAMDEN SAFE DEPOSIT & TRUST COMPANY, Substituted Trustees, et al., *Defendants.*

ROBERT K. BELL,
For Defendant Receiver,
BOURGEOIS & COULOMB,
Opposed.

MEMORANDUM.

AVIS, District Judge:

The plaintiffs, as substituted trustees appointed by this Court to take over the execution of a certain trust created by the First National Bank of Ocean City, N. J. (hereinafter called the bank), now insolvent, bring this action for the purpose of discovering the amount of money the trust is entitled to from the securities and funds of the bank placed in its trust department to secure trust funds, used by the bank in its commercial department, and for decrees appointing a trustee or trustees to take over and liquidate

the entire trust fund now in the hands of the receiver of said bank.

The bill sets out the date of insolvency of the bank, the taking over by the Comptroller of the Currency, and the appointment of a receiver; that the bank at the time of insolvency had certain trust funds and property, the administration of which devolved upon the receiver on his appointment; that the plaintiffs were appointed substituted trustees for the GG Mortgage Pool on March 13, 1933; that the bank had collected the amount due on a certain mortgage in this pool in the sum of approximately $70,000, which was not turned over to the substituted trustees.

The bill then sets out sundry other trusts which were controlled by the bank at the time of its insolvency, including private and court trusts and also the mortgage pools; that the bank had set aside certain collateral in its trust department to secure the moneys intrusted to it, and that the plaintiffs and defendants claim to have some interest in these trust securities; that the receiver of the bank turned over to the plaintiffs certain securities and deeds for property, but neglected to pay $72,500, collected on sundry mortgages theretofore placed in the trust by the bank, to the GG Mortgage Pool.

The bill then sets out certain securities in the hands of the bank in its trust department, held as collateral for trust funds, and alleges that the said securities so reported are collateral for the said sum of $72,500 belonging to the GG Mortgage Pool and also for the other trusts enumerated therein.

The bill then alleges that the parties interested in the collateral are unable to agree upon the amount to be allocated to each individual trust, and that the receiver, upon whom the administration of said trust has devolved, is without authority to enter into such agreement.

The prayers are briefly:

(1) That the defendants answer.

(2) That discovery be made as to the claims of all parties interested in the collateral.

(3) That all claimants set forth in detail the basis of their claims.

(4) That this court ascertain and determine the value of securities, and allocate to each claimant his or her proportionate share.

(5) That if the collateral cannot be divided,

(a) A trustee be appointed to sell the collateral and divide the proceeds;

(b) If it is determined the collateral should not be sold, to hold same in care of the trustee until the arival of an appropriate time to sell;

(c) That the trustee be required to enter into bond.

(6) That writs of subpoena issue.

(7) "That plaintiffs have such other and further relief in the premises as shall be agreeable to equity and good conscience."

Sundry defendants have filed answers; others have made no appearance, and E. O. Howell, Jr., receiver of the bank, has moved to strike the bill of complaint on the ground that this Court lacks jurisdiction to entertain the suit.

It will be seen that the effort here is to appoint a trustee in liquidation for all of the securities or funds in the hands of the receiver, which were allocated to the trust department of the bank, and to distribute the fund pro rata to those entitled thereto. The bill does not allege any disagreement between the receiver of the bank and the interested parties, as to the value of trust securities or the amount of any individual claim. It is apparent that the value of the trust securities is not sufficient to satisfy all of the trust claims in full.

Counsel for the receiver relies upon certain Congressional enactments as a justification for his claim that the control and proper distribution of the trust assets is in the hands of the Comptroller of the Currency and the receiver

duly appointed. The powers and duties of a receiver are set forth in 12 U. S. C. A. sec. 192 as follows:

> "Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necesary to pay the debts of such association, enforce the individual liability of the stockholder. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

A national bank is authorized to act as trustee, etc., under the provisions of 12 U. S. C. A. sec. 248 (k). Under this authority the bank is required to segregate all assets held in any fiduciary capacity from the general assets of the bank and keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection.

The portion of the above statute having special relevance to the issue in the instant case, reads as follows:

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System.
>
> In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."
>
> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money

> so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; * * *."

(12 U. S. C. A. sec. 194.)

The direct question here involved does not seem to have been determined by any court, at least counsel have not cited any decision, and I have been unable to find any. However, all decisions examined tend to the conclusion that, as to the funds of insolvent national banks, the authority of the Comptroller is absolute, and that the courts may not interfere except upon a showing of fraud, mismanagement, lack of good faith, dispute as to right of lien, or controversy as to amount.

The exclusive nature of the control of the Comptroller and receiver is stated in *Earle* v. *Pennsylvania*, 178 U. S. 449.

In *Hulse* v. *Argetsinger* (D. C. W. D. N. Y.) 12 F. (2d) 933 the court, referring to the statute, said on page 935:

> "This provision, it seems to me, plainly gives the Comptroller entire control of the insolvent bank, with the evident purpose of speedily winding up its affairs regardless of the wishes of the stockholders."

In *Liberty Nat. Bank of South Carolina* v. *McIntosh* (CCA 4) 16 F. (2d) 906, syllabus 2 expresses the conclusion of the court in the following language:

> "Jurisdiction of Comptroller of Currency in respect to all matters properly within his discretion relative to liquidation of national banks is exclusive, and his action therein is not subject to review."

In *Anderson* v. *Cronkleton* (CCA 8) 32 F. (2d) 170 the court said on page 171:

> "When a national bank becomes insolvent and is taken over by the Comptroller of the currency and placed in

the hands of a receiver all its assets pass to the control of the receiver."

In *Taylor* v. *Spurway* (CCA 5) 72 F. (2nd) 97 the court took jurisdiction of a suit against a receiver, and granted certain restraints because of a finding of gross fraud.

In the case of *Gimbel* v. *Harriman Nat. Bank & Trust Co. of City of New York* (CCA 2) 83 F. (2d) 153, certiorari denied 299 U. S. 559, the court directed that the plaintiff should have a lien upon certain assets of an insolvent bank deposited to secure trust funds. No suggestion was made in that case tending towards an independent liquidation by substituted trustees, but the court tacitly approved of the liquidation of the trust assets by the receiver.

In *Grindley* v. *First Nat. Bank, Detroit* (CCA 6) 87 F. (2d) 110, the court on page 112 said:

> "Section 191, title 12 U. S. C. (12 U. S. C. A. sec. 191), provides that whenever the Comptroller of the Currency is satisfied that a national bank is insolvent, he may 'after due examination of its affairs— * * * appoint a receiver who shall proceed to close up such association.' By title 12 U. S. C. A. sec. 192, the receiver was required under the direction of the Comptroller, to take possession of the books, records, and assets of every description of the bank and collect all debts, dues and claims belonging to it. He was further required to 'pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller.' The purpose of these statutes is to place the exclusive control of an insolvent national bank in the hands of the Comptroller of the Currency for the liquidation of its assets through a receiver who acts under his direction. Easton v. Iowa, 188 U. S. 220, 231, 23 S. Ct. 288, 47 L. Ed. 452; Cook County Natl. Bank v. United States, 107 U. S. 445, 448, 2 S. Ct. 561, 27 L. Ed. 537; Port Newark Natl. Bank, etc., v. Waldron, 46 F. (2d) 296, 299 (C. C. A. 3); Liberty Natl. Bank v. McIntosh, 16 F. (2d) 906, 909 (C. C. A. 4); Hulse v. Argetsinger, 12 F. (2d) 933, 935 (D. C.)."

Counsel for plaintiffs in their brief cite several cases claimed to sustain plaintiffs' position:

The case of *American Can Co.* v. *Williams* (CCA 2) 153 F. 882 only asserted the right of the court to restrain the receiver from transmitting certain property to the Comptroller until the question at issue in that suit had been determined. This decision was on rehearing.

The original circuit court of appeals case is found in 149 F. 200, and the only question involved was the right of the court to restrain the payment of assets to the Comptroller pending the determination of the validity of a claimed lien.

The ultimate decision of this controversy in the lower court is found in 176 F. 816, and it involved the right to the proceeds of a draft which was collected by the receiver. It has no relevancy to the present controversy.

The case of *Skud* v. *Tillinghast* (CCA 6) 195 F. 1 is general in its nature and inapplicable to the instant case. Of course, the receiver cannot appropriate for the benefit of the creditors any asset that in equity and good conscience belongs to another.

The effort in the instant case is to take over the administration of a general lot of securities, and to make distribution to those entitled, without any suggestion that the liquidation is being improperly carried on by the receiver. The statute leaves the liquidation to the Comptroller and his receiver.

In *Poisson* v. *Williams* (D. C. E. D. N. Car.) 15 F. (2d) 582 the issue was with relation to a designated trust fund, for which an independent trustee had been appointed. This substituted trustee was endeavoring to recover from the receiver not the whole of the bank's trust securities but only that which it was claimed the bank held in trust for the plaintiff in that suit. The funds in the hands of the receiver admittedly were sufficient to pay all claims, and the court there justly directed that the receiver make payment. The principle in that case is not applicable to the present controversy.

The case of *Scott* v. *Armstrong,* 146 U. S. 499, 510 disposed of the question of set-off, and determined that a debtor of the bank had the right to offset any amount he had on deposit against the claim of the receiver.

So far as I can see that case has no bearing upon the instant controversy. The language in the opinion can refer only to the matter there at issue, and the statement that "ratable dividends" are to be made from what belongs to the bank "and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank" relates, as it reads, to the debtor's right to offset what the bank owes him against any claim which the bank has against him.

The case of *Fourth Street Bank* v. *Yardley,* 165 U. S. 634 is not in point. The language quoted in the brief for plaintiffs is academic, and has no bearing upon the right to control and liquidate the trust securities, held by bank at the time of closing as security for moneys held by bank in a fiduciary capacity.

If the bank held an individual trust to secure which certain and definite securities had been pledged, as in the case of the GG Pool, I can see the right to appoint a substituted trustee to handle the assets and take over the pledged securities, but the facts in the instant case are that the securities pledged are the property of the insolvent bank, pledged in toto to secure various accounts.

The right to liquidate and distribute, unless there exists fraud, dispute as to amount, the right of lien, or mismanagement is lodged in the hands of the Comptroller and his receiver. The proper distribution, in case of any dispute or alleged preferences, may be within the court's jurisdiction, otherwise the court cannot interfere.

I feel that counsel for plaintiffs has not differentiated between a specific trust and one general in its nature to secure sundry deposits.

This Court does not have jurisdiction, and the motion to dismiss will be granted.

* * * * * * * * * * *

DISTRICT COURT OF THE UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY

I, George T. Cranmer, Clerk of the District Court of e United States of America for the District of New Jer- y, in the Third Circuit, do hereby certify the foregoing be a true copy of the original ORDER DISMISSING LL on file, and now remaining among the records of the id Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my me and affixed the seal of the said Court, at Trenton, in id District, this 12th day of November, nineteen hundred d thirty-seven.

(SIGNED) GEORGE T. CRANMER,
Clerk, District Court, U. S.

By (SIGNED) KATHRYN M. FLYNN,
Deputy.

Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 374.

TICONIC NATIONAL BANK, PEOPLES-TICONIC NATIONAL BANK, AND ARTHUR G. PICHER, as Receiver of Each Said Banks, *Petitioners*,

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE, *Respondents*.

REPLY BRIEF FOR PETITIONERS TO RESPONDENTS' BRIEF AND TO BRIEF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE.

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Press of Byron S. Adams, Washington, D. C.

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IN THE

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No. 374.

TICONIC NATIONAL BANK, PEOPLES-TICONIC NATIONAL BANK, AND ARTHUR G. PICHER, as Receiver of Both Said Banks, *Petitioners*,

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE, *Respondents.*

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

REPLY BRIEF FOR PETITIONERS TO RESPONDENTS' BRIEF AND TO BRIEF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE.

A.

REPLY TO RESPONDENTS' BRIEF.

Respondents have cited several cases in their brief in an attempt to support their position but an examination of those cases reveals either that they have no bearing upon the issues now before the court or that they support petitioners' position.

The first case referred to on Page 2 of respondents' brief as "the Michigan Case", 244 U. S. 416, is properly cited as *First National Bank of Bay City* v. *Fellows,* 244 U. S. 416, decided by this Honorable Court in 1917, and the issue was the constitutionality of the provisions of Section 11(k) of the Federal Reserve Act, (Sec. 248(k), Title 12, U. S. C.). No insolvent national bank was involved and the case has no relation to the question of the stopping of interest as of the date of suspension of an insolvent national bank.

The next case, referred to on Page 3 of respondents' brief, *B. and A. R. R. Co.* v. *Mercantile Trust and Deposit Co.,* 82 Md. 535, can be found in 34 Atl. 778, and involved an insolvent insurance company which prior to insolvency had deposited certain assets with the state treasurer as security for the payment of claims on policies issued by it. The question was whether the holders of those policies were entitled to the proceeds of the securities thus segregated. The court decided that the pledge was a valid one. The only comment about interest made by the court related to one of the claims based upon taxes due. There the court said, at Page 582:

> "We think no interest should be allowed on the claim for taxes or on any of the other claims filed against the insolvent company. While not precisely analogous, the case of Hutchinson v. Liverpool & Lon. & Gl. Ins. Co., 153 Mass. 143, 26 N. E. 439, supports this conclusion. It is not easy, if indeed it be possible, to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. Perhaps some of the numerous claims might in strictness be entitled to an allowance of interest under ordinary circumstances; but it does not appear that the amounts asserted to be due have been wrongfully withheld by the Casualty Company. The failure to pay, as far as we can see, has been the result of the company's insolvency. A penalty or damages in the way of interest ought not, therefore, to be added to the sums actually due."

The case of *Bassett* v. *Fidelity and Deposit Co.,* 184 Mass. 210, 68 N. E. 205, cited on Page 3 of respondents' brief, in-

volved an action against a solvent surety company and has no bearing upon the instant case. In the case of *Blake* v. *Traders National Bank,* 145 Mass. 13, 12 N. E. 44, likewise cited on Page 3 of respondents' brief, the action was against a solvent national bank and the issues have no relation to the issues in the present case. The next case cited, *Choate* v. *Arrington,* 116 Mass. 552, also involved a suit against solvent sureties and, of course, has no bearing upon the instant case.

The last three cases cited on Page 3 of respondents' brief are properly cited as follows: *In the Matter of Murray,* 6 Paige 204, (Paige's Chancery Reports—New York), *In re Edward Hagan,* 10 N. B. R. 383, and *In re Richard, Mary and S. R. Town,* 8 N. B. R. 40. The first case involved an insolvent insurance company and the last two cases involved bankrupt estates. In all three cases it happened that the assets produced sufficient to pay the claims of all creditors in full with a surplus over and the courts ruled that the creditors were entitled to interest out of that surplus. This, of course, is consistent with petitioners' position as stated on pages 7 and 17 of petitioners' original brief.

It thus appears that respondents have cited no decisions which can be construed as supporting the decisions of the lower courts in the instant case in allowing interest to the respondents for a period subsequent to the date of the suspension of the Peoples-Ticonic National Bank.

B.

REPLY TO BRIEF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE.

The Reconstruction Finance Corporation divides its argument into two main points. The *first* is the contention that the lien of the secured contract creditor of a national bank extends to interest to the date of payment and the *second* main point is that a rule to the effect that the appoint-

ment of a receiver for a national bank limits the liens of its secured contract creditors, would be detrimental to national banks.

The Reconstruction Finance Corporation devotes several pages in support of the contention that the National Bank Act does not limit the lien of the secured creditor of a national bank upon the appointment of a receiver therefor. The cases cited, however, do no more than recognize the principle which the petitioners themselves recognize, namely, that all of the assets of the bank pass to the receiver subject to the rights of the creditors with respect thereto. *Chemical National Bank* v. *Armstrong,* 59 Fed. 372, affirmed sub nom; *Aldrich* v. *Chemical National Bank,* 176 U. S. 618; *Scott* v. *Armstrong,* 146 U. S. 499. On page 7 of the brief of the Reconstruction Finance Corporation, the court's attention has been referred to Section 52 of the National Bank Act (U. S. R. S. Sec. 5242) relating to preferential transfers by national banks. This would be pertinent if petitioners were attacking the validity of the contract or the validity of the segregation of assets in the trust department to protect uninvested trust funds. No such attacks are being made by petitioners however. We admit the validity of the contract and we admit the validity of the segregation of securities to protect uninvested trust funds. All we seek to do is to show what rights flow from the valid contract protected by assets validly segregated, when insolvency intervenes.

It is petitioners' position that when insolvency ensues and the forces of government of necessity intervene to take charge of the assets for the purpose of distribution of the proceeds thereof to the various creditors of the insolvent, all of the assets of the insolvent become a trust fund for the benefit of all of the creditors and the rights of the respective creditors whether secured or unsecured, become fixed as of that date. *Chemical National Bank* v. *Armstrong,* 59 Fed. 372, 375; *Scott* v. *Armstrong,* 146 U. S. 499, 507.

If it were possible, in practice as in theory, to convert all of the assets into cash as of the date of insolvency, the secured creditor would receive the benefit of his security and any other pro-rata share in the general assets to which he might be entitled as of that date and no question of interest would be involved. However, the necessary operation of the law for the protection of all creditors and the efficient and orderly liquidation of the assets inevitably entails some delay in the payment of the creditors. This delay is not the fault of the debtor nor the fault of the unsecured creditors but it is the unavoidable result of the insolvency and the necessary intervention of the protective forces of the law. This thought was well expressed in the case of *People* v. *American Loan and Trust Company,* 172 N. Y. 371, 65 N. E. 200, decided by the Court of Appeals of the State of New York in 1902. There, because of the provisions in the charter of the American Loan and Trust Company, which became insolvent, certain of the creditors were preferred. Those creditors were paid in full the principal amount due as of the date of insolvency and then raised the issue as to their right to collect interest. The court said, at Page 379:

> "If the fund in the hands of the court could have been distributed on the same day that the receiver was appointed, no claim of interest could have arisen, for there would have been no delay and no suspension of legal remedies. The delay in distribution, however, was the act of the law itself, and was essential for various purposes, and, among others, to enable the creditors to prove their claims. * * * Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets. If the assets are sufficient to pay all, including interest, it may be paid, for, as against the corporation itself, interest should be allowed before the return of any surplus to the stockholders. As between the creditors themselves, however, no interest should be allowed during the process of administration, and the delay necessarily resulting therefrom, because the assets are equit-

ably their assets, the administration is for their benefit, and the delay is necessary to enable them to take action to present their claims in proper form, as well as to enable the court to put the assets in shape for distribution."

This same equitable principle is clearly enunciated in the case of *Sexton* v. *Dreyfus*, 219 U. S. 339, 55 L. Ed. 244, decided by this Honorable Court in January, 1911. There the creditor of a bankrupt estate having sold his collateral security, sought to apply the proceeds first to interest accrued subsequent to the date of the adjudication, and to file a claim against the bankrupt estate for the unpaid balance. There this Court, while recognizing the strength of the argument in support of the secured creditor's position, said, at Page 343:

"Some further countenance to that course is thought to be found in Sec. 57h, which provides that the value of securities shall be determined by converting them into money 'according to the terms of the agreement,' for it is urged that by construction the right to apply them to interest is as much part of the agreement as if it had been written in. Nevertheless it seems to us that on the whole the considerations on the other side are stronger and must prevail.

"For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. Ex parte Bennet, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts; Ex parte Wardell, 1787; Ex parte Hercy, 1792, 1 Cooke, Bankrupt Laws, 4th Ed. 181; (1st ed., Appx.) and notwithstanding occasional doubts it has been so applied with the prevailing assent of the English judges ever since * * *. As appears from Cooke, sup., the rule was laid down not because of the words of the statute but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we

copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state."

The court further said:

"The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well-known illustration of Chief Justice Shaw's *Parks* v. *Boston,* 15 Pick. 198, 208, the whole matter could be settled in a day by a pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain. If, under Sec. 57 of the present act, the value of the security should be determined by agreement or arbitration the time for fixing it naturally would be the date of the petition. *At that moment the creditors acquire a right in rem against the assets.* Chemical National Bank v. Armstrong, 59 Fed. Rep. 372, 378, 379; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 140. When there is a delay in selling because of the hope of getting a higher price it is more for the advantage of the secured creditor than of anyone else, as he takes the whole advance and the others only benefit by a percentage, which does not seem a good reason for allowing him to prove for interest by indirection." (Italics ours.)

It is recognized that in bankruptcy under the holding in *Sexton* v. *Dreyfus, supra,* the secured creditor is entitled to apply against interest accrued subsequent to the date of the adjudication, any income accrued and collected on the security for the period subsequent to the date of the adjudication. It was pointed out, however, in petitioners' original brief, Page 12, that this phase of the decision has no application to insolvent national banks because in the case of a bankrupt estate, the secured creditor who wishes to file a claim against the bankrupt estate, must sell or evaluate his security as of the date of the adjudication and reduce his claim by the proceeds or the value of the collateral. Hence,

that creditor virtually becomes the owner of the collateral security from the date of the adjudication and in equity should be entitled to the income, but in the case of an insolvent national bank, the secured creditor is allowed a claim for the full amount due as of the date of suspension without regard to the value of the collateral security. *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 43 L. Ed. 640; *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, 44 L. Ed. 611.

If, in the case of bankrupt estates, the stopping of interest as of the date of the adjudication as prescribed in *Sexton* v. *Dreyfus, supra,* is an essential and reasonable rule adopted in the absence of a specific statutory requirement to that effect, but for the more effective and equitable distribution of the assets of the bankrupt certainly there are equally compelling and cogent arguments in support of the application of that rule to *all* creditors of an insolvent national bank.

The authority of the receiver of a national bank to take possession of and administer all of the assets of the bank is derived from R. S. Sec. 5234, Title 12, U. S. C. 192, which provides in part:

> "Such receiver under the direction of the Comptroller, *shall take possession of the books, records, and assets of every description of such association,* collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct;" (Italics ours.)

In the case of *Earle* v. *Pennsylvania,* 178 U. S. 449, this Honorable Court in commenting upon the operation of this statute said at pages 454, 455:

> "The scheme of the statute relating to suspended national banks is that from the time of a bank suspension *all of its assets, of whatever kind, as they are at the time of suspension,* pass in the first instance, to the Receiver, the proceeds thereof to be distributed by the

Comptroller among those whose claims are proved to his satisfaction or are adjudicated by some court of competent jurisdiction.'' (Italics ours.)

Petitioners do not contend that the above statutory requirements and the judicial construction thereof deprive the secured creditor of the benefit of his security, but it is believed that as of the date of suspension, the rights of all creditors become fixed, rights in personam are converted into rights in rem and the amounts due the respective claimants as of the date of suspension determine the amounts of the claims whether secured or unsecured against all of the assets of the insolvent bank. *White* v. *Knox,* 111 U. S. 784, 787.

In the instant case the assets on which the lien was fixed in favor of the respondents were assets which had been segregated in the trust department of the bank to secure uninvested trust funds as required by the provisions of 11(k) of the Federal Reserve Act. National Banks conducting fiduciary activities at the time the trust indenture in this case was executed, were subject to the regulations of the Federal Reserve Board and in Section 8 of Regulation F issued by the Federal Reserve Board in 1930, Appendix page 14, it is specifically prescribed that the securities so segregated shall be owned by the bank. A similar provision appears in Section 9 of Regulation F of the Board of Governors of the Federal Reserve System issued in 1936 and cited on page 29 of the appendix to the brief of the Reconstruction Finance Corporation. *In fact, such securities remain in the physical possession of the bank and the receiver takes actual possession thereof upon his appointment. Thus, these securities became part of the trust fund held for the benefit of all the creditors, subject of course, to the lien of the respective trust claimants, such claims being measured by and co-extensive with the amounts due those trust claimants as of the date of suspension of the bank.*

Claimants of an insolvent national bank, whose uninvested trust funds are secured by assets segregated in the trust

department, as in the instant case, are given what might be termed a statutory preference with respect to the assets thus segregated, but it is maintained that a proper construction of the act will not permit an extension of the protection to cover interest subsequent to the date of suspension in the absence of a specific provision in the statute to that effect. A similar question was discussed in the case of *Greva* v. *Rainey*, 41 Pac. (2d) 328, decided by the Supreme Court of California in 1935. In that case the Pan American Bank of California was in process of liquidation. The applicable portion of the State Banking Act provided for the apportionment of the capital and surplus for each department with the approval of the Superintendent of Banks and a bank having several departments was required to keep the books, deposits, reserves, cash, securities, investments, etc. separate from each of the other departments. All the money and assets belonging to each department were required to be held solely for the re-payment of the depositors and other claimants of such department until all depositors and other claimants of each department had been paid and then the overplus remaining could be applied to any other liabilities of such bank. The question before the court was whether the depositors of the commercial department who had been paid the principal amounts of their claims, were entitled to interest from the date the bank closed to the date of the payment of their claims before any transfer of funds to liquidate the claims of depositors in the savings department. The court in deciding that the creditors of the commercial department were not entitled to interest before the creditors of the savings department were paid in full, said on page 331:

> "The decisions, including those hereinabove cited, are uniform to the effect that in so far as is possible the creditors of an insolvent debtor must be treated on a basis of equality. See, also, White v. Knox, 111 U. S. 784, 4 S. Ct. 686, 28 L. Ed. 603; Thomas v. Western Car Co., 149 U. S. 95, 116, 117, 13 S. Ct. 824, 37 L. Ed. 663. That, indeed, is the premise from which springs

> the rule that interest ordinarily will not be computed nor paid from the date of the suspension of business, or commencement of the receivership or other liquidation procedure. Therefore, there being but one debtor involved, all creditors are entitled to equal consideration except where the statute expressly provides otherwise ,and then only to the extent provided. It follows that the fact that section 27 requires the assets of each department to be held solely for the 'repayment of the depositors' of that department is not to be held to enlarge the rights of such depositors so as to include interest when the act is silent on the matter and otherwise interest would not be recoverable. The reasoning to be applied when the question is one of interest as between creditors is stated in People v. American Loan and Trust Co., supra, viz.: 'Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets.' "

The provisions of 11(k) of the Federal Reserve Act relating to the segregation of assets in the trust department to protect uninvested trust funds (pages 25 and 26 of App. of petitioners' original brief) do not prescribe that those assets secure interest computed on the amount of the uninvested trust funds for any period subsequent to the date of insolvency. Hence, the respondents in this case are in a position very similar to the claimants in the case of *Greva* v. *Rainey, supra,* and *People* v. *American Loan and Trust Company, supra.* They have a preferred right to be paid the amounts due them as of the date of insolvency out of the proceeds of certain of the assets of the bank, but as was said in the case of *People* v. *American Loan and Trust Company,* 172 N. Y. 371, 65 N. E. 200, at page 379:

> "As the statute does not say that preferred claims shall be paid with interest to the date of payment, the courts should not, because the claims of substantially all of the creditors, both preferred and unpreferred, were alike in origin, for they were created by the deposit of money, and preferences in derogation of the common law should not be extended by construction beyond the express command of the statute."

It is the duty of the receiver, when he takes possession of all of the assets of the bank under the applicable statutory provisions to ascertain, in the orderly course of liquidation and administration, what claims are entitled to the protection of the assets segregated in the trust department under the provisions of 11(k) of the Federal Reserve Act. Many of these claims are subject to doubt and other claims not appearing on the trust department books may be subsequently established as entitled to the protection of said securities. Hence, delays in payment of the trust claims are inevitable and indeed, essential to the equitable distribution of the proceeds of the assets of the bank. Therefore, in the instant case, the delay in paying the respondents was in no sense the fault of the debtor corporation or of the unsecured creditors of the bank. There was no contract for the payment of interest on respondents' claim, therefore, interest could be allowed only in the form of damages. Under these circumstances, it would appear to be shockingly inequitable to encroach upon the rights in the assets already vested in all of the creditors by virtue of the operation of law upon the suspension of the bank, for the purpose of paying damages to the secured creditors for the inevitable delays of liquidation and distribution which are suffered alike by the unsecured as well as the secured creditors.

As to the other point discussed in the brief of the Reconstruction Finance Corporation, beginning on page 19, to the effect that the rule contended for by petitioners would be detrimental to national banks, we need only say that such an argument might be pertinent respecting the future legislative policy of the Congress but cannot be considered as a justification for judicial modification of existing laws as interpreted by the courts under applicable rules of construction.

It is respectfully submitted that the decree of the United States Circuit Court of Appeals for the First Circuit in so far as it provides for the payment of interest to the claim-

ants for a period subsequent to the date of insolvency of the Peoples-Ticonic National Bank should be reversed.

F. HAROLD DUBORD,
Attorney for Petitioners.

GEORGE P. BARSE,
TREVOR V. ROBERTS,
JAMES LOUIS ROBERTSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

APPENDIX.

Section 8 of Regulation F of the Federal Reserve Board as amended October 17, 1930.

(a) *In General.*—Funds received or held in the trust department of a national bank awaiting investment or distribution shall be invested or distributed as soon as practicable and shall not be held uninvested by the bank any longer than is reasonably necessary.

(b) *Deposits in commercial or savings department of trustee bank.*—Funds received or held in the trust department of a national bank awaiting investment or distribution may be deposited in the commercial department or savings department of the bank to the credit of the trust department; provided that the bank first delivers to the trust deparment, as collateral security—

(1) Bonds, notes, or certificates of indebtedness of the United States; or

(2) Other readily marketable securities of the classes in which State trust companies or State banks exercising trust powers are authorized or permitted to invest trust funds under the laws of the State in which such bank is located; or

(3) Other readily marketable securities of the classes defined as "investment securities" pursuant to section 5136 of the Revised Statutes of the United States as amended by the act of February 25, 1927.

The United States bonds or other securities so deposited as collateral shall be owned by the bank and shall at all times be at least equal in market value to the amount of trust funds so deposited in the commercial department.

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IN THE

Supreme Court of the United States

OCTOBER TERM

1937

No. 374

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER,
AS RECEIVER OF BOTH SAID BANKS,
Petitioners,

v.

LOTTIE F. SPRAGUE and MARGARET DAVIS SPRAGUE,
Respondents.

Petition for Writ of Certiorari to The United States Circuit Court of Appeals for the first Circuit

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Reasons Against Granting Certiorari

May it Please the Court:

We object to the granting of this petition because the decisions of the courts below are just and right. A very

brief statement of the facts as we see them will make our position more clear.

The Federal Reserve Act containing section 11 (k), now U. S. C. Tit. 12 section 248 (k), was approved December 23, 1913.

December 30, 1926 the Ticonic National Bank received a permit to act under this section, and on the same day enacted by-laws establishing a trust department. R. 5.

From time to time bonds were segregated as shown. R. 3.

> "Early in 1931, prior to the acceptance of the Sprague trust by the Ticonic Bank, Mr. Charles W. Vigue, who was president and remained president and director of the Peoples Bank, had become president and director of the Ticonic Bank and an officer of its trust department; (that) he assumed active management and control of the latter bank's affairs; (that) several other gentlemen were and remained directors of both banks; and (that) both banks were practically controlled by one stock ownership." R. 59.

March 28, 1931 the Sprague indenture of trust was established and under it the Ticonic Bank received the fund of $5022.18. R, 2, 9, 13, 14, 20.

April 2, 1931 the directors of the Ticonic Bank confirmed the execution of the trust. Mr. Vigue, president of both banks, attended this meeting. R. 38.

August 3, 1931 the two banks consolidated. R. 21, and par. 11 of Defendants' answer R. 14.

Upon this consolidation by virtue of U. S. C. Tit. 12 Sec. 34 the Peoples Bank, which then called itself the Peoples-Ticonic, took all assets and securities of the Ticonic subject to all liens, rights and equities of third parties.

March 4, 1933 the Peoples-Ticonic Bank was closed by order of the President of the United States.

March 25, 1933 Mr. Charles W. Vigue, president of the bank, was appointed conservator. R. 4.

November 6, 1933 Mr. Arthur G. Picher, the present petitioner, was appointed receiver. R. 4.

June 28, 1934 he was appointed receiver of the Ticonic. R. 4. After Mr. Picher's appointment he found the vote segregating "$20,000 Kingdom of Denmark 6s, due 1942." R. 34. These bonds were then "with the special liquidator of securities, for sale," and Mr. Picher knew "that they bore a mark 'In trust Box 1080' ". R 34, 35.

But it appears that long before this the Peoples-Ticonic had taken the whole list of Ticonic trust bonds and used them for other purposes. R. 35.

But they still remained in the Peoples-Ticonic Bank and came into the hands of the receiver where we found they were before bringing this suit. R. 34, 35.

Regular payments of $50 per month were made to Margaret Davis Sprague down to August 6, 1934. Defendant's Exhibit 3. These include payments made by both banks, by the conservator, and by the receiver.

This suit was brought upon the theory that the Ticonic Bank was authorized to act under section 248 (k); that the bonds were lawfully segregated; that the fund was turned over to the bank as trustee; that as the bank never invested nor deposited a single dollar in accordance with the indenture the funds remained uninvested and on failure of the bank the owners of the funds were entitled to a lien on the segregated bonds, which we were entitled to enforce and the suit was brought for that purpose. We further assumed that the ordinary rights, duties and obligations pertaining to fiduciaries and their sureties arose in this case.

The courts below agreed with all our contentions and we believe this court will find those decisions correct.

If certiorari is granted we will of course consider the other suggestions raised by counsel for the comptroller.

The plain justice of the decision seems however to make review unnecessary.

Reasons For Granting Certiorari

Counsel suggest that certiorari should be granted

> "in order that the present doubt as to the correct rules of law to follow may be settled."

With this fine altruistic sentiment we concur. If the crude and crazy notions displayed in the conduct of this trust, by both banks, the conservator and the receiver, apparently with the approval of the comptroller's office, are really held by any substantial part of the banking world then it is high time that this court review the law and repeat a few fundamental principles.

To bring about review on this ground we offer our assistance to the learned counsel for the comptroller and venture to point out a few reasons which they have, inadvertently no doubt, omitted.

While this case involves only one trust it will be noted R. 46 that there are fourteen others in consimili casu.

The matter is part of a great banking fiasco which became a fiasco because it defied and violated all statutes, laws, rules and regulations in sight. So far as this case and No. 408 afford opportunity we believe it would be a great public service for this court to restate such elementary principles as are applicable.

Monopoly banking, arising from ownership of numerous banks by one corporate stockholder, lies at the root of the whole situation. We have presented and discussed this feature in our petition and brief in No. 408 and refer to that brief as an expression of views which we still hold.

The conduct of both banks, the conservator and the receiver, has been wrong all the way from the very beginning.

As all were under the supervision and control of the comptroller we feel like laying responsibility at the door of his office.

The Ticonic Bank never observed the terms of the indenture. It bought no securities and did not deposit one

thousand dollars in its savings department as provided by the indenture. R. 49.

It simply deposited the fund in its commercial department and used it like all other common deposits. R. 20.

When the consolidation took place, August 3, 1931, The Ticonic Bank delivered and the Peoples Bank received every dollar of cash and every security held by the Ticonic in connection with all its trusts. R. 48, 49.

The Peoples simply took possession of everything even continuing to use the Ticonic ledger sheets. R. 49.

But the Peoples never formally or nominally became trustee. Its president and trust officer sent checks regularly to the Spragues who probably supposed that the Peoples, now calling itself Peoples-Ticonic, had lawfully succeeded the Ticonic as trustee. R. 49.

Then the conservator and lastly the receiver continued sending these monthly checks down to August, 1934.

All the above is so glaringly and obviously wrong that it would require no comment nor review were it not for the fact that it appears to have been done with the consent and approval of the comptroller's office which now attempts to uphold and support these transactions.

But the comptroller goes further. Before suit was brought and during all the litigation down to the present moment he has persistently denied existence of a trust and especially denies a lien on the segregated bonds. Vide his first specification of error p 5 of his petition, and the first assignment of error. R. 53, and par. 11 of his answer. R. 14.

Consistently with his denial of the trust the comptroller has persisted in treating these plaintiffs who are respectively trustor and beneficiary as common creditors of the Peoples-Ticonic National Bank. Vide assignment 2 R. 53.

Very intriguing is his reasoning on page 70 of his petition where he reaches the conclusion that

> "the lien against the Kingdom of Denmark bonds was automatically released."

At the bottom of p 18 of his petition it is pointed out that the Kingdom of Denmark bonds "were owned by the Peoples-Ticonic National Bank."

But the title came from the Ticonic National Bank under the consolidation of August 3, 1931 and by U. S. C. Tit. 12 section 34

> "the said consolidated national bank shall hold and enjoy the same and all rights of property, franchises, and interests in the same manner and to the same extent as was held and enjoyed by the national bank so consolidated therewith."

Both banks, the conservator and the receiver, all acting under the supervision and control of the comptroller, have continually treated the Spragues as common creditors and now insist upon settling with them as such. All this is in utter disregard of their rights under the indenture of trust. Further the receiver should never have attempted to continue the administration of this trust. Immediately on his appointment he should have taken steps to turn over the trust estate to a properly chosen successor. How far he came from this is well shown by his answer R. 13 especially par. 11. And all this by direction of the comptroller.

Verily there should be a review

> "in order that the present doubt as to the correct rules of law to follow may be settled."

We second petitioners' motion. Let certiorari be granted.

Respectfully submitted,

LOTTIE F. SPRAGUE

MARGARET DAVIS SPRAGUE

HARVEY D. EATON,

Counsel For Respondents

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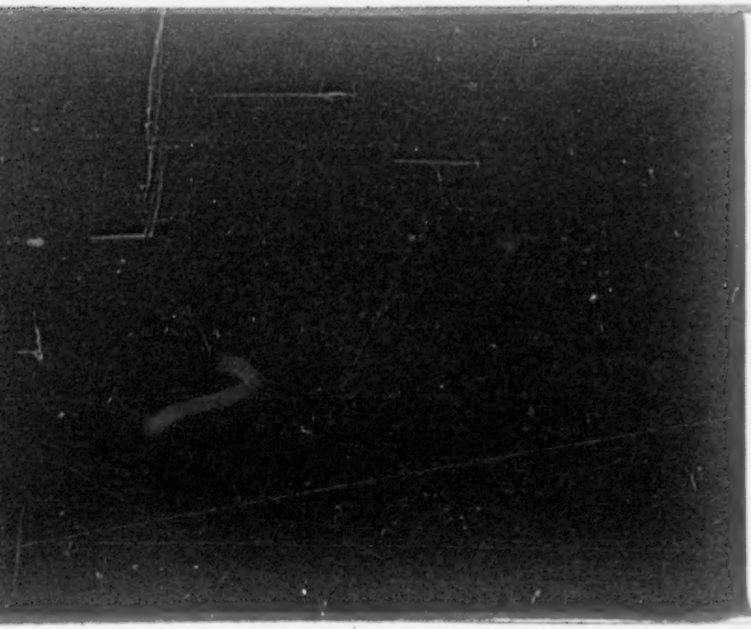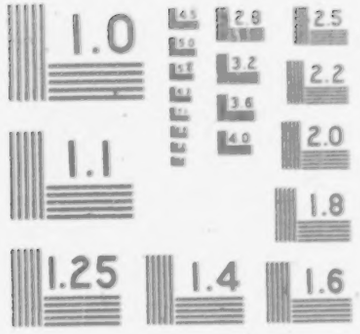

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IN THE

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1937

No. 374

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ARTHUR G. PICHER,
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v.

LOTTIE F. SPRAGUE and MARGARET DAVIS SPRAGUE,
Respondents.

Petition for Writ of Certiorari to The United States Circuit Court of Appeals for the first Circuit

---

Brief For Respondents

A Correction and Stipulation

HARVEY D. EATON,
Attorney for Respondents

TICONIC NATIONAL BANK, ET ALS

v.

LOTTIE F. SPRAGUE, ET AL

No. 374

CORRECTION

In the above entitled case the paragraph on page 3 of the brief for respondents beginning "Regular payments &c" should be changed to read as follows:

> Regular payments of $50 per month were made to Margaret Davis Sprague by the bank from April, 1931 to March, 1933. No payments were made by the Conservator but beginning December 1, 1933 the Receiver made regular monthly payments to and including August, 1934.

The statement in regard to the Conservator near the middle of page 5 should be corrected accordingly.

STIPULATION

It is agreed that the above statement of facts is correct and that defendants' exhibit 3 need not be sent up.

F. HAROLD DUBORD

Attorney for Petitioners

HARVEY D. EATON

Attorney for Respondents

IN THE

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Additional Brief For Respondents

The single question left in this case is as to the allowance of interest. It is found and decided that a lawful trust was established. That securities were segregated in accordance with the statute. That the funds were held in trust for in-

vestment but never invested. That the funds were used by the bank in its own business. That the segregated securities were sold to the Peoples National Bank which had full knowledge of their character and of the trust secured. That the Peoples Bank segregated them again as security for other trusts. That they subsequently came into the hands of the Receiver of the Peoples National Bank who later became Receiver of the Ticonic National Bank. That they were found in his hands before bringing this suit and that he subsequently "sold the bonds for $20,722.66 which sum he now holds apart from the general assets of the banks." (See opinion of the Circuit Court of Appeals).

The question seems to be as to the position and status of these segregated bonds. Shall they be held and charged as personal sureties would be held and charged if the trustee had given a bond with sureties? We believe it was the intention of Congress in passing this Section 248 (k) to impose upon banks acting under it the ordinary duties and obligations of fiduciaries according to long settled and well established rules and principles. By the clause providing for segregation of securities we believe it meant, in the contingency provided for and which has arisen in this case, that the segregated securities should be holden in the same manner and to the same extent that personal sureties would be held on an ordinary bond. No other interpretation is reasonable or hardly possible. This seems to have been taken for granted in the Michigan case 244 U. S. 416 especially at page 426 where the court said:

> "Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question."

The segregation of these securities was itself the creation of a trust in which the bank was trustee, the securities were the res and the beneficiaries were whoever might at any time thereafter be equitably entitled to trust funds held by the bank awaiting investment at the time of insolvency.

B. & A. R. R. Co. v. Mercantile Trust & Deposit Co. 82 Md. 535.

Now then would personal sureties be liable for interest under such circumstances? We believe they are always holden for interest or income in all such cases. We search the books in vain for any exception to this rule.

Vide Bassett v. Fidelity & Deposit Co. 184 Mass. 210 and Blake v. Traders National Bank 145 Mass. 13 in which cases the liability of sureties and the allowance of interest are discussed with many citations.

Vide also Choate v. Arrington 116 Mass. 552 at page 556 where the court says:

> "The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given; and whatever is competent as evidence upon which to charge the principal is competent also against the surety."

Furthermore, it is a general principle in all cases of insolvency that holders of security are entitled to compute interest to the time of settlement if their security is sufficient for that purpose.

Matter of Murray 6 Paige 204;
In re Edward Hogan 10 B. R. 383;
In re R. M. and S. P. Towne 8 B. R. 40.

These plaintiffs are not ordinary creditors. The discussion based on that assumption is wide of the mark.

Respectfully submitted,

HARVEY D. EATON.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 374

TICONIC NATIONAL BANK, PEOPLES-TICONIC NATIONAL BANK, AND ARTHUR G. PICHER, AS RECEIVER OF BOTH SAID BANKS, PETITIONERS

v.

LOTTIE F. SPRAGUE AND MARGARET DAVIS SPRAGUE, RESPONDENTS

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE

STATEMENT

A national bank accepting funds in trust for investment and using the same, pending investment, in the conduct of its business is required by Section 11 (k) of the Federal Reserve Act and Section 9 (b) of Regulation F of the Regulations of the Board of Governors of the Federal Reserve System to deliver to and maintain in its trust department,

as collateral security, United States bonds or other securities having at all times a market value at least equal to the amount of such funds. Upon the failure of such a bank, prior to investment of such funds, the owner thereof has a lien on the bonds or other securities so set apart in addition to his claim against the estate of the bank. The question presented here is whether that lien extends to interest. The District Court and the Circuit Court of Appeals both held that the lien extended to interest to the date of payment, calculated, however, only from the date on which suit was started.

The approach to the question involved in the petition for the writ of certiorari herein to the Circuit Court of Appeals for the First Circuit indicates that petitioners have construed certain decisions of this Court as indicating that the lien of a secured creditor of a national bank is limited, in case of suspension of such a bank, to principal unless the assets of the bank prove to be sufficient to pay all the debts and engagements of the bank in full, plus interest. It is because of that approach and because of the fact that Reconstruction Finance Corporation is a secured creditor of various insolvent banks that this brief is filed.

This brief is directed to the question of the extent of the lien of a secured creditor of a national bank rather than solely to the narrower question, as to the claim for interest on uninvested trust funds, presented by the record in this case.

SUMMARY OF ARGUMENT

It is submitted, *first*, that the liens of secured contract creditors of a national bank extend to interest to the date of payment; and, *second*, that it would be detrimental to national banks if a rule existed to the effect that the appointment of a receiver for such a bank limited the liens of such creditors.

I

THE LIEN OF A SECURED CONTRACT CREDITOR OF A NATIONAL BANK EXTENDS TO INTEREST TO THE DATE OF PAYMENT

Security posted for the performance of a contract to repay money with stated interest equally secures both the promise to repay the principal sum and the promise to pay interest as stated.

A secured creditor's lien is not limited to principal or to principal and a part of interest by the appointment of a trustee in bankruptcy for his debtor. Bankruptcy Act, Section 67d; *Coder* v. *Arts*, 213 U. S. 223. Nor is a secured creditor's lien so limited by the appointment of a receiver in equity for the affairs of the debtor. *American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261; *Board of County Commissioners of Sweetwater County* v. *Bernardin* (C. C. A. 10th), 74 Fed. (2d) 809, certiorari denied, 295 U. S. 731; *First National Bank* v. *J. I. Campbell Co.*, 114 S. W. 887 (Tex. Civ. App. 1908). Nor does any such limitation take place in case the assets of the debtor, being a state bank, are taken over for liqui-

dation by the State Banking Department. *State, ex rel. Hansen* v. *Chelan County,* 185 Wash. 327, 54 Pac. (2d) 1006 (1936).

For the reasons briefly discussed below, we submit that a secured creditor's rights in and to his collateral are in no wise limited or affected by the appointment of a receiver for his debtor merely because his debtor happens to be a national bank.

A

The National Bank Act does not limit the lien of a secured creditor of a national bank upon the appointment of a receiver therefor

With reference to the appointment of receivers for and the winding up of the affairs of national banks, the National Bank Act provides that the receiver, upon appointment, "shall take possession of the books, records, and assets of every description" (sec. 50; U. S. R. S., sec. 5234), paying over to the Comptroller of the Currency the proceeds of the assets of the bank as liquidated, and that the Comptroller—

> * * * shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; * * * (sec. 50; U. S. R. S. sec. 5236).

There is no suggestion to be found in the National Bank Act to the effect that liens are in any wise affected by the appointment of a receiver. If Congress had intended to change the fundamental rule of law that security for the performance of a contract containing a promise to repay principal and a promise to pay interest equally secures both promises, it would have done so expressly. Fundamental rules are not changed my implication. The provision for ratable dividends, above quoted, in no wise limits a secured creditor's rights in and to his collateral. The section containing that provision deals with the distribution of the general assets of an insolvent bank—not with creditors' other rights. As was said by Chief Justice Fuller in *Scott* v. *Armstrong,* 146 U. S. 499:

> * * * The receiver took the assets of the Fidelity Bank as a *mere trustee* for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defences that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached (p. 507). [Italics ours.]
>
> * * * * *
>
> * * * The requirement as to ratable dividends, is to make them from what *belongs* to the bank, and that which at the time of the insolvency belongs of right to the debtor does not *belong* to the bank (p. 510). [Italics ours.]
>
> * * * * *

> * * * We cannot believe Congress intended * * * to destroy by implication any right vested at the time of the suspension of a national bank (p. 511).

Chief Justice Taft, then Circuit Judge, said, in *Chemical National Bank* v. *Armstrong* (C. C. A. 6th), 59 Fed. 372, affd. sub nom. *Aldrich* v. *Chemical National Bank,* 176 U. S. 618:

> * * * The suspension of the bank, and its seizure by order of the comptroller, have no effect to change the rights of the creditor with reference to his collateral. He enjoys precisely the same advantage over the unsecured creditor, with respect to the collateral, that he did before the suspension (p. 376).

The interpretation of Section 50 of the National Bank Act (U. S. R. S., sec. 5236) contained in *Scott* v. *Armstrong, supra,* was reaffirmed during this term by this Court in *Willing* v. *Binenstock,* No. 36.

One of the prior contract rights of a secured creditor of a national bank which is vested at the time of its suspension is to hold his collateral until both principal and interest have been paid in full, in accordance with his contract. Insolvency of the bank may prevent him realizing more than a part of his principal out of the general estate, but it does not limit his security rights. Other creditors have no interest in his security until the secured debt is entirely satisfied in so far as it is a lien on

the property of the bank. Their interest is only in the surplus, if any.

Section 52 of the National Bank Act (U. S. R. S. sec. 5242) voids certain preferential transfers by national banks. By doing so, it impliedly recognizes the validity of all others. As was said in *Earle* v. *Carson,* 188 U. S. 42, 47:

> * * * Thus, it is provided, Rev. Stat. sec. 5242, that—
>
> "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void; * * *"
>
> ***This by a negative affirmative establishes the validity of all contracts otherwise lawful made by the Bank concerning its assets before its failure*** * * *. [Italics ours.]

B

Under the decisions of this Court a secured creditor of a national bank, having a valid contract for interest, is entitled to recover interest in full after the suspension of the bank out of the proceeds of his collateral in accordance with the terms of his contract

A secured creditor of a national bank for which a receiver has been appointed, and the general estate of which is sufficient to pay only a percentage of the allowable claims, has two sources to which he may look for the satisfaction of the bank's debt to him. He is entitled to receive dividends out of the estate of the bank on the amount of his claim as of the date of suspension of the bank on the same basis as unsecured creditors, and he may realize upon his security for both principal and interest to the date of payment. His right to dividends was defined by Chief Justice Fuller in *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 135, as follows:

> * * * a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that *dividends* must cease when from them and from collaterals realized, the *claim* has been paid in full. [Italics ours.]

hat definition was reiterated in *Aldrich* v. *Chemi-l National Bank,* 176 U. S. 618. The question volved in both of those cases was whether a se-red creditor of a national bank should be allowed share in dividends out of its general estate in ceivership on the basis of the amount due him as the date of suspension (the Chancery rule), or the amount due at the date of the filing of his aim (the Illinois rule), or of the amount due on e dividend payment date (the Maryland rule), of the amount of the deficiency, if any, remain-g after he had realized upon his collateral (the ankruptcy rule). The Court adopted the Chan-ry rule and thereby placed secured creditors of tional banks in receivership on the same basis r *dividend purposes* as had been established for nsecured creditors in *White* v. *Knox,* 111 U. S. 4. The case of *Merrill* v. *National Bank of Jack-nville, supra,* involved no question of the extent a secured creditor's lien. The value of the credi-r's security in that case was considerably less an the amount of the indebtedness secured there-, and the court carefully limited its decision to e dividend question involved. To that end Chief ustice Fuller said:

> The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any such creditors, and ought not to be construed as having, or being intended to have, such a result.

> Our conclusion is that the *claims of creditors* are to be determined as of the date of the declaration of insolvency, irrespective of the question whether *particular creditors* have security or not (173 U. S., at p. 147). [Italics ours.]

This Court, in *White* v. *Knox,* 111 U. S. 784, held that dividends should be paid to unsecured creditors of a national bank out of the general estate on the basis of the amounts due claimants as of the insolvency date without regard to interest accruing after that date. The case established a rule of convenience in the distribution of the general estate of a national bank in receivership. It had nothing to do with the security rights of a secured creditor, and a reading of the opinion, delivered by Chief Justice Waite, leaves no doubt that the only question considered by the Court was with respect to the distribution of the general estate. For example, he said, in part:

> * * * The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, therefore, *in paying dividends,* to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date *before the percentage of dividend is calculated,* it should be upon all, otherwise

> the distribution would be according to different rules, and not ratably as the law requires (p. 787). [Italics ours.]

In short, that case decided the basis on which dividends are payable to unsecured creditors out of the general estate of an insolvent national bank, and decided no more.

Certain of the Circuit Courts of Appeals apparently have misunderstood the decision in *White* v. *Knox,* and have failed to grasp the true significance of the proviso contained in that part of the opinion in the *Merrill* case quoted above, *supra* p. 8. Thus, the Circuit Court of Appeals for the Third Circuit, in *Richman* v. *First M. E. Church of Collingswood,* 76 Fed. (2d) 344, which case involved the security rights of a person having a statutory lien such as that of the claimants in this case, said:

> * * * Interest is not allowable, as a general rule, after property of an insolvent is in custodia legis. * * * *This has been specifically ruled as to national banks. White* v. *Knox,* 111 U. S. 784, * * * (p. 346). [Italics ours.]

The opinions in *Douglass* v. *Thurston County* (C. C. A. 9th), 86 Fed. (2d) 899, and *Fash* v. *First National Bank* (C. C. A. 10th), 89 Fed (2d) 110, both of which cases involved the rights of secured depositors, also contain language evidencing an apparent misunderstanding of the decision in *White* v. *Knox* and of the above quoted proviso in the opinion in the *Merrill* case.

Conceivably the decisions in the *Richman, F* and *Douglass* cases, *supra,* can be justified by ing effect to the distinction which may be n between interest allowable as damages for withholding of money due and interest specifi or impliedly contracted for. Be that as it n that distinction is not mentioned in the opinio any of those cases and all three of the opin indicate that the misunderstanding is cle traceable to a failure to distinguish a sec creditor's security rights from his rights to dends, with the result that language whic applicable only to dividend rights has been loo used in discussing security rights.

The statement that interest is not allowable a property of an insolvent is in custodia legis i curate only in so far as it states a result witl spect to creditors' rights to dividends out of general estate of a national bank in receivershi the usual case, that is, where the general esta sufficient to pay only a percentage of the ba debts. It has no application to creditors' secu rights except in the distribution of an insuffi fund among lienors of the same rank. In fa has no application to any creditor's right to dends out of the general estate of a national b in receivership, if the general estate proves t sufficient to pay more than principal. *Nati Bank of the Commonwealth* v. *Mechanics' tional Bank,* 94 U. S. 437; *Richmond* v. *I*

121 U. S. 27.[1] Nor, indeed, has it any application to creditors' rights to dividends out of an estate in equity receivership or even in bankruptcy, in such a case. Cf. *American Iron & Steel Manufacturing Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, where the question involved was whether interest was recoverable for the period of a receivership by a creditor having a statutory lien for supplies sold to the defendant prior to the receivership. Mr. Justice Lamar, who delivered the opinion of the Court in that case, in discussing creditors' dividend rights, said:

> * * * *But that rule did not prevent the running of interest during the Receivership;* and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest

[1] In *National Bank of the Commonwealth* v. *Mechanics' National Bank*, it was held that before the assets of a national bank, of which the Comptroller of the Currency has taken possession for liquidation in accordance with the Act, may be returned to its shareholders, its creditors are entitled to demand and receive interest on their claims down to the date of final payment, including as to creditors who have not contracted for interest, interest at the legal rate, computed from the date of demand and refusal according to the practice in entering judgments.

In *Richmond* v. *Irons*, it was decided that, in determining the extent of the liability of shareholders of a national bank, interest accrued on creditors' claims up to the date of payment should be taken into consideration, subject to the limitation, of course, that the shareholders could not be held liable for more than the par value of their shares.

> as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication and as a fixed liability was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. 2 Blackstone's Comm. 488; Cf. *Johnson* v. *Norris,* 190 Fed. Rep. 459, 460 (5) (pp. 266–7). [Italics ours.]

The use by certain of the Circuit Courts of Appeals of language, in describing and determining security rights, that merely states a result in certain instances with respect to creditors' rights to dividends, could have had no other result than that which has occurred, namely, to lead to the confusion to which petitioners refer in their petition for the writ of certiorari herein. If the rights of a secured creditor in and to his security and his rights to ratable dividends out of the insolvent estate of a national bank are considered separately, without confusing the one with the other, and without using language with respect to one which is only applicable in certain instances to the other, we submit that the definition of his rights is a comparatively simple matter.

As to his security rights, it is perfectly clear that the insolvency of the bank does not alter, modify, or limit the same. A contention to the contrary was

fully disposed of in *Scott* v. *Armstrong*, 146 U. S. 499, in which Chief Justice Fuller, in rendering the opinion of the Court, in part, said:

> We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; *but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated.* * * * *The requirement as to ratable dividends,* is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank (p. 510.) [Italics ours.]
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> * * * * * * *
>
> * * * We cannot believe Congress intended * * * to destroy by implication any right vested at the time of the suspension of a national bank (p. 511).

Where, as has previously been pointed out, *supra* p. 3, the lien of a secured creditor, existing prior to insolvency, is not affected by insolvency, it extends to interest accruing until the indebtedness of the insolvent to him is paid in full. On that point, Circuit Judge Sanborn, in delivering the opin-

ion of the Circuit Court of Appeals for the Eighth Circuit in *Coder* v. *Arts* (C. C. A. 8th), 152 Fed. 943, aff'd. 213 U. S. 223, said:

> * * * By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid, and that the mortgaged lands might be sold by the mortgagee, and that their proceeds might be applied to the payment of this debt and interest. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, *so that when the latter came to the hands of the trustee it was mortgaged for the payment of the interest as much as for the payment of the principal, and the proceeds of its sale necessarily came to his possession subject to the same charge.* Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled, then, to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims. But the proceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgagee Arts, and where a trustee sells mortgaged property of the bankrupt's

> estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage (p. 950). [Italics ours.]

The decisions of this Court, defining the rights of unsecured creditors of a national bank to dividends and defining and distinguishing the rights of secured creditors to dividends and their rights in and to their security, may be summed up as follows:

1. Unsecured creditors receive ratable dividends on the amounts due by the bank to them as of the "insolvency" date. *White* v. *Knox*, 111 U. S. 784.

2. Secured creditors receive dividends on the same basis as unsecured creditors. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131; *Aldrich* v. *Chemical National Bank*, 176 U. S. 618.

3. The appointment of a receiver for a national bank does not stop the running of interest on debts owing by the bank, and *dividends* are payable to all creditors on account of interest after principal has been paid. *National Bank of the Commonwealth* v. *Mechanics National Bank*, 94 U. S. 437; *Richmond* v. *Irons*, 121 U. S. 27.

4. All creditors, secured and unsecured, must first get principal in full before any of them can get anything by way of *dividends out of the general estate* to apply on post

closing interest. *Sexton* v. *Dreyfus,* 219 U. S. 339.[2]

5. The failure to pay one creditor of a national bank his ratable dividend at the same time that other creditors receive their dividends entitles the creditor, who has been delayed through no fault of his own in receiving his dividend, to damages measured by way of interest on the amount of his dividend from the date on which the dividend should have been paid to the date of payment. *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470.

6. The appointment of a receiver for a national bank does not invalidate legal or equitable rights then existing in respect to its assets. *Scott* v. *Armstrong,* 146 U. S. 499.

7. A secured creditor's right to *dividends* ceases "when from them and from collaterals realized, the *claim*" (as contrasted with principal of and interest on the secured in-

[2] *Sexton* v. *Dreyfus* was a bankruptcy, not a bank case. However, Mr. Justice Holmes, in delivering the opinion of the Court, pointed out that the conclusion which the Court reached was somewhat sustained by analogy in the case of insolvent banks and cited both the *Merrill* case and *White* v. *Knox.* The *Sexton* case involved an additional point, namely, whether in determining the amount of a secured creditor's allowable claim income from collateral should be applied to the indebtedness as of the date of the filing of the petition or to interest accruing after that date. This Court held that the income should be applied to post insolvency interest. In *Gamble* v. *Wimberly* (C. C. A. 4th), 44 Fed. (2d) 329, the same principle was applied in the case of a national bank.

debtedness) "has been paid in full" and "their right to retain their securities ceases" when they "have received payment in full" (that is principal of and interest on the secured indebtedness). *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 135, 147. [Italics ours.]

II

A RULE TO THE EFFECT THAT THE APPOINTMENT OF A RECEIVER FOR A NATIONAL BANK LIMITS THE LIENS OF ITS SECURED CONTRACT CREDITORS WOULD BE DETRIMENTAL TO NATIONAL BANKS

In our opinion the adoption of a rule denying creditors who loan money to national banks the right to collect interest out of collateral, as contrasted with the opposite rule, would result in discrimination by banks and other lending institutions against national banks in favor of state banks and would have injurious results to depositors and unsecured creditors of national banks which are placed in receivership and would force national banks to pursue practices which are not only unsound but which would be injurious both to their depositors and creditors and to the public at large.

If the situation were such that lending banks and other financial institutions recognized that secured creditors of national banks could not realize interest after insolvency out of security, loans would probably not be made to national banks except on readily marketable collateral and the present

normal flow of credit would be seriously impeded. This disadvantage would be felt by national banks in the conduct of business during normal times as they would be compelled, from time to time, to sell their investments to meet temporary needs for cash instead of being able to borrow and pledge their assets as is normally done. The disadvantage, however, would have more far reaching consequences during periods of depression when it is not possible for banks to liquidate their assets satisfactorily and with sufficient rapidity to meet heavy deposit demands, and national banks, finding as a result of such a rule that the normal avenues of credit were closed to them, would have no other course but to sacrifice assets at prices which would be certain to bring on insolvency to the detriment of their depositors and creditors and thereby increase the depth of the depression to the detriment of the public at large by tying up purchasing power in the form of frozen bank deposits.

The raison d'être of banks and similar financial institutions is the collection of interest. They are not interested in acquiring title to security which they hold as collateral, and, as a rule, prefer to leave the responsibility for the handling of the liquidation of security to the borrowing bank or its receiver. Admittedly, a borrowing bank, with its intimate knowledge of its own assets, its familiarity with local conditions, and its close contact with the

people with whom it has to deal, or its receiver with that knowledge, familiarity, and contact, can, with proper supervision and guidance, handle the liquidation of a bank's assets so as to obtain the most therefrom, and it is only through a liquidation conducted in an orderly manner over a reasonable period of time that real, as contrasted with sacrifice, values can be obtained. This has been abundantly proved by the experience of the Reconstruction Finance Corporation, which has been that the equity of depositors and unsecured creditors of banks in collateral security can not only be protected and preserved, but, in fact, enhanced during liquidation by the bank's receiver if the liquidation is conducted in accordance with an orderly and properly supervised program.

If perchance a bank or other lending institution should overlook the effect of such a rule and make a loan to a national bank and the bank should go into receivership, there would be no other prudent course for the lending institution to follow, in the interest of self preservation, but to foreclose immediately upon the collateral. By such a course the lending bank would destroy the equity of the depositors and creditors of the borrowing bank in the collateral, which equity would otherwise have been protected, preserved, and possibly enhanced through an orderly liquidation over a reasonable period of time.

CONCLUSION

The true rule, consistent with this Court's interpretation of the National Bank Act, is that where a creditor of a national bank realizes from security an amount sufficient to pay the principal sum owing to him at the date of the appointment of the Receiver, together with interest accruing on the principal balances due from time to time, the creditor is absolutely entitled to retain, out of the proceeds of such collateral sufficient sums to pay both principal and interest, calculated in accordance with his contract to the date of final payment.

If this Court, in deciding the extent of the lien of the claimants herein, as created by Section 11 (k) of the Federal Reserve Act, holds, by reason of the distinction between damages by way of interest and interest pursuant to contract, or for other reasons, that such a lien does not extend to damages, measured by interest in full, then it is respectfully requested that the Court's opinion shall clearly indicate that its decision is limited to the question of the extent of the statutory lien of an owner of funds delivered to a national bank for investment and held by it awaiting investment at the time the bank closes, and that its decision has no application to the right of a secured creditor of such a bank, having a valid contract for interest, to recover interest in full out of the proceeds of

his collateral in accordance with the terms of his contract.

Respectfully submitted.

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APPENDIX

Federal Reserve Act, as Amended

SECTION 11. Enumerated Powers:

The Board of Governors of the Federal Reserve System shall be authorized and empowered:

* * * * *

(k) *Permitting national bank to act as trustees, etc.*—To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this chapter.

National banks exercising any or all of the powers enumerated in this subsection (k) shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper

detail all transactions engaged in under authority of this subsection. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this chapter shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System.

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits, and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.

National banks in such cases shall not be required to execute the bond usually required of individ-

uals if State corporations under similar circumstances are exempt from this requirement.

National banks shall have power to execute such bond when so required by the laws of the State.

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

In passing upon applications for permission to exercise the powers enumerated in this subsection, the Board of Governors of the Federal Reserve System may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: *Provided,* That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

Any national banking association desiring to surrender its right to exercise the powers granted under this subsection, in order to relieve itself from the necessity of complying with the requirements of this subsection, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Board of Governors of the Federal Reserve System a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such a resolution, the Board of Governors of the Federal Reserve System, after satisfying itself that such bank has been relieved in accordance with State law of all duties as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private, or other appointments previously accepted under authority of this subsection, may, in its discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this subsection. Upon the issuance of such a certificate by the Board of Governors of the Federal Reserve System, such bank (1) shall no longer be subject to the provisions of this subsection or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this subsection without first applying for and obtaining a

new permit to exercise such powers pursuant to the provisions of this subsection. The Board of Governors of the Federal Reserve System is authorized and empowered to promulgate such regulations as it may deem necessary to enforce compliance with the provisions of this subsection and the proper exercise of the powers granted therein.

Regulations of the Board of Governors of the Federal Reserve System. Regulation F, Trust Powers of National Banks

SECTION 9. Trust Funds Awaiting Investment or Distribution:

* * * * *

(b) *Use in conduct of business of trustee bank.*—Funds received or held by a national bank as fiduciary awaiting investment or distribution shall not be used by the bank in the conduct of its business, unless the bank, under authorization by its board of directors, first delivers to the trust department, as collateral security—

(1) Bonds, notes, bills, certificates of indebtedness or other direct obligations of the United States, or obligations fully guaranteed by the United States as to principal and interest; or

(2) Other readily marketable securities of the classes in which State trust companies or State banks exercising trust powers are authorized or permitted to invest trust funds under the laws of the State in which such national bank is located; or

(3) Other readily marketable securities of the classes defined as "investment securities" pursuant to section 5136 of the Revised Statutes of the United States, as amended.

The securities so deposited as collateral shall be owned by the national bank and shall at all times be at least equal in market value to the amount of the trust funds so used in the conduct of the bank's business.

Bankruptcy Act, as Amended

SECTION 67. Liens:

* * * * *

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.

National Bank Act, as Amended

SECTION 50 (U. S. R. S. sec. 5236):

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

SECTION 50 (U. S. R. S. sec. 5234):

On becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or other-

wise, shall be required in the case of such parts of the deposits as are insured under section 12B of the Federal Reserve Act, as amended. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits.

SECTION 52 (U. S. R. S., sec. 5242):

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

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SUPREME COURT OF THE UNITED STATES.

No. 374.—October Term, 1937.

Ticonic National Bank, Peoples-Ticonic National Bank, et al., Petitioners, *vs.* Lottie F. Sprague and Margaret Davis Sprague.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 7, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency.

On March 28, 1931, respondent Lottie F. Sprague delivered $5,022.18 to the trust department of the Ticonic National Bank of Waterville, Maine, in trust, under an agreement which authorized the trustee to invest in bonds or securities and to deposit at least $1,000 in its savings department at usual rates of interest; required specified monthly payments, subject to certain conditions, to Margaret Sprague, also a respondent here; and reserved to the grantor the right to revoke the trust and resume possession of the trust funds.

The Ticonic Bank had been authorized by the Federal Reserve Board to act in a trust capacity, as provided in Section 11(k) of the Federal Reserve Act, as amended (12 U. S. C., § 248(k)). That Act provides that funds held in trust awaiting investment "shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities" approved by the Board of Governors of the Federal Reserve System, and further provides that "In the event of the fail-

ure of such bank the owners of the funds held in trust for in ment shall have a lien on the bonds or other securities so set a in addition to their claim against the estate of the bank."

Pending investment of funds under the Sprague trust, and suant to its resolution implementing the statutory provision quoted, the Ticonic Bank placed the funds of this trust, along other trust funds awaiting investment or distribution, as a dep in its commercial checking department to the credit of its t department, and secured the total amount of such funds by set aside in the trust department bonds, including $20,000 Kingdo Denmark 6's, 1942, at least equal in value to the total amoun such deposits.

On July 29, 1935, respondents, the settlor and benefici brought this suit in the District Court for Maine to have the b held as security with respect to the trust. It appears that on gust 3, 1931, Ticonic Bank sold its assets (including the Denm bonds) to the Peoples National Bank (later called Peoples-Tic National Bank) in consideration of its agreement to "assum pay all the indebtedness of said Ticonic Bank to its depositor that Ticonic Bank then went into voluntary liquidation; that March 4, 1933, the Peoples-Ticonic Bank was closed; that Art Picher was appointed receiver for Peoples-Ticonic Bank on Nov ber 6, 1933, and subsequently, on June 28, 1934, for the Tic Bank, which had been continuing its voluntary liquidation.

The lower courts treated the suit, brought against both banks against Picher as receiver, as one to assert and enforce the protecting the uninvested funds. They held that, in view Section 11 (k) of the Federal Reserve Act, as amended, resp dents had acquired a lien upon the bonds set apart by the conic Bank to secure the deposit of the trust department; that this lien had never been discharged or divested and so exten to the proceeds of the Denmark bonds, which had been sold by receiver for $20,722.66. We do not pause to state the conclusi of fact and of law by means of which the lower courts arrived this result, for in the grant of the writ of certiorari this C declined to review the ruling that a statutory lien for the protect of the owners of the funds held for investment extended to the p ceeds of the Denmark bonds, the lower courts having predica their decision in large part on the facts of this particular case.

The decrees below did not end with the matters just stated. The District Court, finding that the proceeds of the bonds exceeded the trust funds on deposit,[1] held the respondents entitled to payment in full of $3,649.65, the amount to which the Sprague trust account had been reduced, with interest from the date of the filing of the bill of complaint. At first the Circuit Court of Appeals reversed that part of the decree allowing interest, but on rehearing it affirmed the decree in toto, approving the allowance of interest out of the proceeds of the Denmark bonds, which it assumed were sufficient to meet with interest the amount of all trust deposits. It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid.

The attention of this Court was called to the fact that the ruling conflicted with decisions in other circuits, where secured creditors were held not entitled to any interest after the suspension of the national bank,[2] and for this reason certiorari was granted, limited to this question of interest. — U. S. —.

As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand.[3] Compare *Stewart* v. *Barnes*, 153 U. S. 456, 462; *United States* v. *North Carolina*, 136 U. S. 211, 216.

The bank's obligation to pay interest as damages for the detention of the debt is not cut off by suspension of its business and receivership. The principle has been established, and claimants held entitled to such interest, in cases where the principal amount of each of the claims was paid in full from the assets of the bank (*National*

[1] The total uninvested trust funds on deposit in the commercial department of the Ticonic Bank amounted to about $10,000 at the time of the sale of its assets, and to about $12,000 when the Peoples-Ticonic Bank was closed in 1933.

[2] Richman *v.* First Methodist Episcopal Church of Collingswood, 76 F. (2d) 344, 346 (C. C. A. 3d), certiorari denied, Long *v.* First Methodist Episcopal Church, 296 U. S. 593; Douglas *v.* Thurston County, 86 F. (2d) 899, 909 (C. C. A. 9th); Fash *v.* First Nat'l Bank of Alva, 89 F. (2d) 110, 112 (C. C. A. 10th).

[3] We need not explore petitioner's suggestion, that if interest is granted at all it should be measured from an earlier date than that of the judicial demand contained in the bill of complaint, since respondent has filed no cross-petition for certiorari complaining of that restriction (Langnes *v.* Green, 282 U. S. 531, 536-538).

Bank of the Commonwealth v. *Mechanics' National Bank,* 94 U. S. 437), including if necessary the double liability of the shareholders (*Richmond* v. *Irons,* 121 U. S. 27, 64).

It is true that in the liquidation of national banks, dividends from the general funds on unsecured claims are made pro rata upon the amount of each claim as of the date of the insolvency, *White* v. *Knox,* 111 U. S. 784. This method of distribution gives a proportional part of the available funds to each creditor, in accordance with the statute requiring a "ratable dividend." R. S. § 5236. Whether the reason for this method of determining dividends is to avoid prejudice from the inevitable delay of court proceedings for liquidation (*In re Humber Ironworks and Shipbuilding Company,* IV Ch. App. Cas. 643, 646; *American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Ry.,* 233 U. S. 261, 266; cf. *People* v. *American Loan & Trust Company,* 172 N. Y. 371, 379); to facilitate administration (*Sexton* v. *Dreyfus,* 219 U. S. 339, 344; *Chemical National Bank* v. *Armstrong,* 59 Fed. 372, 387); or because on that date the creditors acquire a right in rem against the assets in the hands of the receiver (*Chemical National Bank* v. *Armstrong, supra,* 379; *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 140; *Sexton* v. *Dreyfus, supra,* 345) is immaterial. Dividends are paid on that basis. It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors. *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470.

The rule of *White* v. *Knox, supra,* does not require that interest be denied to the secured creditors unless the principle of equality of distribution is to be applied as between all creditors. Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the bank gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any general creditor, and in so far as dividends are paid to

ecured creditors from free assets, they share ratably with the unecured creditors, and their claims bear interest to the same date, iat of insolvency. Compare *Merrill* v. *National Bank of Jacksonille*, 173 U. S. at 146; *Aldrich* v. *Chemical National Bank*, 176 . S. 618, 638. But to the extent that one debt is secured and nother is not there is manifestly an inequality of rights between he secured and unsecured creditors, which cannot be affected by he principle of equality of distribution (*American Iron and Steel Manufacturing Co.* v. *Seaboard Air Line Ry., supra*, at 266; *Chemcal National Bank* v. *Armstrong, supra*, at 376-377), and interest ecruing after insolvency may not be withheld on account of that rinciple.

The rule as to the date to which interest is to be allowed on ecured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to he lien of individual creditors, unless we are to disregard the rights n these assets acquired prior to insolvency. But "liens, equities or rights arising . . . prior to insolvency and not in contemplation thereof are not invalidated." *Scott* v. *Armstrong*, 146 U. S. 499, 510; *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 145. By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property 'in addition to their claim against the estate of the bank." Section 11(k) of the Federal Reserve Act as amended. The statutory ien prior to receivership withdrew the pledged security from the ssets of the bank available to general creditors, in so far as night be necessary to satisfy the lien. Though title to the collateral was in the name of the bank, it was subject to this lien, and o that extent the property pledged could not properly be said to elong to the bank for purposes of distribution to creditors. *Scott* . *Armstrong, supra* at 510.

As the obligation to pay interest is not destroyed by the insolency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion hat a secured creditor of a national bank in receivership may enorce his lien against his security, where it is sufficient to cover both rincipal and interest, until his claim for both is satisfied.

With respect to analogous liquidations the rule just announced

has long been in force.[4] This Court has already held that a lien-holder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (*Coder* v. *Arts*, 213 U. S. 223, 245, affirming, 152 Fed. 943, 950) or into equity receivership (*American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry. Co.*, 233 U. S. 261), and though interest will be denied the unsecured creditors if the assets are insufficient to pay all claims in full. Compare *In re Humber Ironworks and Shipbuilding Co.*, IV Ch. App. Cas. 643, with *In re Humber Ironworks and Shipbuilding Co.*, V Ch. App. Cas. 88. The same rule was applied to state banks in *Washington-Alaska Bank* v. *Dexter Horton National Bank*, 263 Fed. 304, 306.

Petitioners suggest that the rule just laid down may have the effect of penalizing the unsecured creditors for the precaution of the receiver in litigating doubtful claims asserted against segregated assets. This could be true only where the interest accruing to the secured creditors during the pendency of the litigation exceeds the appreciation in value of, and the income from, the security. And since in many cases if the receiver is successful his conduct of the litigation will inure to the advantage of the general creditors, they may fairly be charged with the expenses of contesting the claim, including interest by way of damages. Cf. *Chemical National Bank* v. *Armstrong*, *supra*, 59 Fed. at 384.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[4] Compare 7 Vin. Abr. 110: "*A mortgagee shall have his interest run on* upon a bankrupt's estate, because he hath a right in rem, *but as to other interest, it ceaseth on the bankruptcy.* Per Ld. Chan. King, 18 July 1729."